

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1013, §61.1014

The Texas Education Agency (TEA) proposes new §61.1013 and §61.1014, concerning school finance. The proposed new sections would implement the Texas Education Code (TEC), §42.2524 and §41.0931, by addressing the reimbursement of disaster remediation costs for schools in a designated disaster area.

The TEC, §42.2524 and §41.093, provide for the reimbursement of disaster remediation costs for school districts in an area declared a disaster area by the governor under Texas Government Code, Chapter 418. A school district or charter school may apply for assistance with paid disaster remediation costs that it does not anticipate recovering through insurance, federal disaster relief payments, or other sources.

Proposed new 19 TAC §61.1013 would implement the statutory requirements of TEC, §42.2524, by establishing provisions for a grant program that would be created should Foundation School Program (FSP) funds become available. The new section would establish what qualifies for eligible disaster remediation costs, the application process, eligibility and reporting requirements, the amount of the grant, prioritization of applicants, the finality of the award, and how funds would be distributed.

Proposed new 19 TAC §61.1014 would implement the statutory requirements of TEC, §41.0931, by establishing provisions for a credit against recapture costs for districts subject to the wealth equalization provisions of TEC, Chapter 41. The new section would establish what qualifies for eligible disaster remediation costs, the application process, eligibility and reporting requirements, the amount of the credit, the finality of the award, and how funds would be distributed.

The proposed rule action would require school districts and charter schools that wish to request assistance with disaster remediation costs to prepare and submit applications detailing the amount of the disaster remediation costs and reimbursements available from other sources. Districts and charter schools would be required to submit yearly updates documenting any changes to the amounts of reimbursement received from other sources until the disaster is considered finalized and closed.

The proposed rule action would require recipients of assistance for disaster remediation costs to maintain documents related to

payments and application certifications for two years after the disaster is considered finalized and closed.

FISCAL NOTE. Kara Belew, deputy commissioner for finance, has determined that for the first five-year period the new sections are in effect, there will be no fiscal impact to the state beyond what the statute requires. School districts and charter schools that are awarded funds under this program would see an increase in FSP payments or a decrease in recapture payments owed to the state. There is no effect on local economy for the first five years that the proposed new sections are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Ms. Belew has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be to allow the TEA, if surplus FSP funds are available, to provide school districts and charter schools with financial assistance in paying disaster relief costs. School districts subject to the wealth equalization provisions of TEC, Chapter 41, would receive credits against recapture owed to the state to assist with disaster relief costs. There is no anticipated economic cost to persons who are required to comply with the proposed new sections.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND MICROBUSINESSES. There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins August 19, 2016, and ends September 19, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to rules@tea.texas.gov. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on August 19, 2016.

STATUTORY AUTHORITY. The new sections are proposed under the Texas Education Code (TEC), §42.2524, which requires the commissioner to adopt rules for the reimbursement of disaster remediation costs for school districts located in an area declared a disaster area by the governor under Texas Government Code, Chapter 418, if excess Foundation School Program funds are available; and the TEC, §41.0931, which requires the commissioner to adopt rules to provide a credit against recapture costs for districts subject to the wealth equalization provisions of

TEC, Chapter 41, that are located in an area declared a disaster area by the governor under Texas Government Code, Chapter 418, and that have incurred disaster remediation costs.

CROSS REFERENCE TO STATUTE. The new section implements the Texas Education Code, §42.2524 and §41.0931.

§61.1013. Foundation School Program Funding for Reimbursement of Disaster Remediation Costs.

(a) General provisions. This section implements the Texas Education Code (TEC), §42.2524 (Reimbursement for Disaster Remediation Costs). The commissioner of education may make a grant application available and announce the amount of funds available and the due date for applications for that grant cycle for a school district or charter school to apply for an amount of Foundation School Program (FSP) funds determined by the commissioner if the commissioner determines that:

(1) amounts for this purpose have been appropriated in accordance with Texas Government Code, §418.073; or

(2) appropriated FSP funds are highly likely to exceed the amount to which school districts or charter schools are entitled under the TEC, Chapter 42 and Chapter 46, under the FSP for the biennium, after accounting for all critical FSP data required to make FSP expenditure estimates and all other required FSP grants or FSP awards are fulfilled in accordance with Texas law, and there is sufficient funding remaining to provide for a grant program under the TEC, §42.2524.

(b) Eligibility. A school district or charter school that meets the following criteria is eligible to apply:

(1) in accordance with TEC, §42.2524(a), all or part of the school district or charter school must be located in an area declared a disaster by the governor under Texas Government Code, Chapter 418;

(2) in accordance with TEC, §42.2524(b), the school district or charter school must have incurred and paid disaster remediation costs during the two-year period following the date of the governor's initial proclamation or executive order declaring a state of disaster that the school district or charter school does not anticipate recovering through insurance proceeds, federal disaster relief payments, or another similar source for reimbursement; and

(3) in accordance with TEC, §42.2524(b), the school district or charter school must apply for reimbursement during the two-year period following the date of the governor's initial proclamation or executive order declaring a state of disaster. The school district or charter school must submit a completed application by the application deadline. A school district or charter school that submits an incomplete application or submits an application after the application deadline may be deemed ineligible for funds.

(c) Definitions. The following terms have the following meanings when used in this section.

(1) Disaster remediation costs--Costs incurred by a school district or charter school for replacing school facilities, equipment, and supplies needed to provide instruction at a location where students eligible for FSP funding regularly attend classes.

(2) Paid disaster remediation costs--Costs that are paid or remitted resulting in an outflow of cash in exchange for goods or services evidenced by an invoice, receipt, voucher, or other such document, and in accordance with standards found in the Financial Accountability System Resource Guide adopted by reference in §109.41 of this title (relating to Financial Accountability System Resource Guide) and TEC, §42.2524(b), (e), and (h), that the school district or charter school does not anticipate recovering through insurance proceeds, federal disaster relief payment, or another similar source of reimburse-

ment in accordance with TEC, §42.2524(b), and that were paid during the two-year period following the governor's initial proclamation or executive order declaring a state of disaster.

(d) Application process. A school district or charter school must submit a new application each time funds are made available under subsection (a) of this section on a form prescribed by the Texas Education Agency (TEA). The application shall contain, at a minimum, the following:

(1) identification of the governor's initial proclamation or executive order declaring a state of disaster and evidence that all or part of the school district or charter school is in the area declared a disaster;

(2) the total dollar amount of paid disaster remediation costs;

(3) the total dollar amount of paid disaster remediation costs paid during the two-year period following the governor's proclamation or executive order declaring a state of disaster that the school district or charter school anticipates to be reimbursed from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement;

(4) the total difference between the amounts of paid disaster remediation costs specified in paragraphs (2) and (3) of this subsection and, of the total difference, the specific paid disaster remediation costs for which the school district or charter school is seeking reimbursement as part of the grant program supported by evidence of payment pursuant to subsection (c)(2) of this section;

(5) an explanation as to why the school district or charter school does not anticipate to be reimbursed from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement for each specific paid disaster remediation cost identified in paragraph (4) of this subsection for which the school district or charter school is seeking reimbursement as part of the grant program;

(6) a certification from the school district or charter school board and school district superintendent or charter school chief executive officer that all paid disaster remediation costs for which the school district or charter school is seeking reimbursement under paragraph (4) of this subsection qualify as paid disaster remediation costs that the school district or charter school paid during the two-year period following the governor's initial disaster proclamation or executive order declaring a disaster and that the school district or charter school board and school district superintendent or charter school chief executive officer do not anticipate recovering through insurance proceeds, federal disaster relief payments, or another similar source of reimbursement; and

(7) a certification from the school district or charter school board and school district superintendent or charter school chief executive officer that the school district or charter school, for any paid disaster remediation costs for which the school district or charter school is seeking reimbursement under paragraph (4) of this subsection, the school district or charter school has made and will continue to make efforts to seek reimbursement from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement as allowable or appropriate.

(e) Finality of award. Awards of assistance under this section will be made based only on paid disaster remediation costs. Prior to making an award, TEA may request additional documentation including, but not limited to, evidence described in subsection (c)(2) of this section and evidence supporting the certifications required by subsections (d)(6) and (7) of this section. A school district or charter school

is not entitled to any requested reimbursement, and a decision by the commissioner is final and may not be appealed.

(f) Deadlines. The commissioner will announce a deadline for grant applications in conjunction with making a determination of the amount of funds available for the grant program cycle. All applications received by the announced deadline will be reviewed. Applications will be funded if sufficient funds are available to fully fund each application. If sufficient funds are not available to fully fund each application, funding will be allocated in accordance with subsection (g) of this section.

(g) Prioritization of awards. Upon close of the application cycle, all eligible applications will be awarded priority status in accordance with the criteria outlined in paragraphs (1) and (2) of this subsection. All applications within Priority 1 will be fully funded before funds are allocated to Priority 2.

(1) Priority 1. Applications from school districts and charter schools that are not subject to the provisions of TEC, Chapter 41. If insufficient funds are available to fully fund Priority 1 eligible applications, award amounts will be reduced proportionately.

(2) Priority 2. Applications from school districts or charter schools that are subject to the provisions of TEC, Chapter 41. If sufficient funds are not available to fully fund Priority 2 eligible applications, award amounts will be reduced proportionately. Only expenses that were not reimbursed under the TEC, §41.0931 (Disaster Remediation Costs), are eligible to be reimbursed under this section.

(h) Distribution of funds. Funds will be allocated through the FSP and will appear on the school district or charter school payment ledger and be delivered as soon as is practicable after awards have been made.

(i) Reporting requirement. Annually after the date of the award under this grant program, the school district or charter school board and school district superintendent or charter school chief executive officer shall provide a certified report on a form prescribed by the TEA until all insurance proceeds, federal disaster relief, or other similar sources of reimbursements related to the disaster are finalized. On the report, the school district or charter school shall identify any insurance proceeds, federal disaster relief payments, or other similar sources of reimbursement that the school district or charter school received for which the school district or charter school previously received payment from TEA under subsection (g) of this section. TEA will adjust funding for any overpayments made to the school district or charter school based on the final report out of the school district's or charter school's future FSP payments or will require a refund from the school district or charter school.

(j) Finalization of award. When the school district or charter school determines that all insurance proceeds, federal disaster relief payments, or other similar sources of reimbursement that the school district or charter school anticipates receiving are finalized and there are no pending claims, the school district or charter school board and school district superintendent or charter school chief executive officer shall certify to the TEA in writing that the annual report in subsection (i) of this section is no longer necessary and disaster reporting is finalized.

(k) Record retention and audit. The school district or charter school shall maintain all documents necessary to substantiate payment and certifications made in subsections (c)(2), (d), (e), and (f) of this section, and the school district or charter school is subject to audit by the TEA until two years after the school district or charter school certifies to the TEA in writing that the disaster is finalized and closed in accordance with subsection (j) of this section.

§61.1014. Credit Against Recapture for Reimbursement of Disaster Remediation Costs.

(a) General provisions. This section implements the Texas Education Code (TEC), §41.0931 (Disaster Remediation Costs). The commissioner of education shall make an attendance credit application available. The commissioner may make a credit application available prior to a request for assistance.

(b) Eligibility. A school district that meets the following criteria is eligible to apply:

(1) all or part of the school district must be located in an area declared a disaster by the governor under TEC, Chapter 418;

(2) the school district must have incurred and paid disaster remediation costs during the two-year period following the date of the governor's initial proclamation or executive order declaring a state of disaster that the district does not anticipate recovering through insurance proceeds, federal disaster relief payments, or another similar source for reimbursement; and

(3) the district purchases attendance credits under TEC, §41.091.

(c) Definitions. The following terms have the following meanings when used in this section.

(1) Disaster remediation costs--Costs incurred by a school district or charter school for replacing school facilities, equipment, and supplies needed to provide instruction at a location where students eligible for FSP funding regularly attend classes.

(2) Paid disaster remediation costs--Costs that are paid or remitted resulting in an outflow of cash in exchange for goods or services evidenced by an invoice, receipt, voucher, or other such document, and in accordance with standards found in the Financial Accountability System Resource Guide adopted by reference in §109.41 of this title (relating to Financial Accountability System Resource Guide) and TEC, §42.2524(b), (e), and (h), that the school district does not anticipate recovering through insurance proceeds, federal disaster relief payment, or another similar source of reimbursement in accordance with TEC, §41.0931(b), and that were paid during the two-year period following the governor's initial proclamation or executive order declaring a state of disaster.

(d) Application process. A school district must submit an application seeking a credit against recapture on a form prescribed by the Texas Education Agency (TEA). The application shall contain, at a minimum, the following:

(1) identification of the governor's initial proclamation or executive order declaring a state of disaster and evidence that all or part of the school district is in the area declared a disaster;

(2) the total dollar amount of paid disaster remediation costs during the two-year period following the governor's proclamation or executive order declaring a state of disaster;

(3) the total dollar amount of paid disaster remediation costs paid during the two-year period following the governor's proclamation or executive order declaring a state of disaster that the school district anticipates to be reimbursed from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement;

(4) the total difference between the amounts of paid disaster remediation costs specified in paragraphs (2) and (3) of this subsection and, of the total difference, the specific paid disaster remediation costs for which the school district is seeking to reduce attendance credits under TEC, §41.093, as part of this credit program supported by evidence of payment pursuant to subsection (c)(2) of this section;

(5) an explanation as to why the school district does not anticipate to be reimbursed from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement for each paid disaster remediation cost identified in paragraph (4) of this subsection;

(6) a certification from the school district board and superintendent that all paid disaster remediation costs for which the school district is seeking reimbursement under paragraph (4) of this subsection qualify as paid disaster remediation costs and that the school district board and superintendent do not anticipate recovering these payments through insurance proceeds, federal disaster relief payments, or another similar source of reimbursement; and

(7) a certification from the school district board and superintendent that the school district, for any paid disaster remediation costs for which the school district is seeking a credit under paragraph (4) of this subsection, the school district has made and will continue to make efforts to seek reimbursement from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement as allowable or appropriate.

(e) Amount of the credit. The total amount of the credit cannot exceed the total amount required to be paid by the school district for attendance credits under TEC, §41.093, during the two-year period following the date of the governor's initial proclamation or executive order declaring a disaster. This credit limit will be recalculated each May of the two school years for which the credit can apply. No changes to the size of the credit will be made for that school year after that time. The amount of credits to be paid by the school district under TEC, §41.093, will be reduced by the amount of any disaster remediation costs the school district identifies under subsection (d)(4) of this section that the school district paid during the two-year period following the governor's initial declaration of a disaster or executive order. Prior to providing a credit, TEA may request additional documentation including, but not limited to, evidence described in subsection (c)(2) of this section and evidence supporting the certifications required by subsections (d)(6) and (7) of this section.

(f) Updates for new payments. If a school district makes more paid disaster remediation cost payments after submission of its initial application to the TEA, the TEA will prescribe a form allowing the school district to submit additional paid disaster remediation cost payments and information consistent with the application process in subsection (d) of this section and will increase the amount of credit as appropriate pursuant to subsection (e) of this section.

(g) Reporting requirement. Annually the school district board and superintendent shall provide a certified report on a form prescribed by the TEA until all insurance proceeds, federal disaster relief, or other similar sources of reimbursements related to the disaster are finalized. On the report, the school district shall identify any insurance proceeds, federal disaster relief payments, or other similar sources of reimbursement that the school district received for which the school district previously received a credit against student attendance credits under TEC, §41.093, and this program. The school district is required to refund the Foundation School Program the full amount for any payment received.

(h) Finalization of award. When the school district determines that all insurance proceeds, federal disaster relief payments, or other similar sources of reimbursement that the school district anticipates receiving are finalized and there are no pending claims, the school district board and superintendent shall certify to the TEA in writing that the annual report required by subsection (g) of this section is no longer necessary and disaster reporting is finalized.

(i) Record retention and audit. The school district shall maintain all documents necessary to substantiate expenditures and certifica-

tions made in subsections (c)(2), (d), (e), and (f) of this section, and the school district is subject to audit by the TEA until two years after the school district certifies to the TEA in writing that the disaster is finalized and closed in accordance with subsection (h) of this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2016.

TRD-201603999

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: September 18, 2016

For further information, please call: (512) 475-1497



TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 152. ATTORNEYS' FEES

The Texas Department of Insurance, Division of Workers' Compensation (division) proposes the repeal and re-enactment of 28 Texas Administrative Code (TAC) §152.3, *Approval or Denial of Fee by the Commission*, and §152.4, *Guidelines for Legal Services Provided to Claimants and Carriers*. The division also proposes new §152.6, *Attorney Withdrawal*, along with the repeal and re-enactment of §152.3 and §152.4.

Labor Code §408.221, *Attorney's Fees Paid to Claimant's Counsel*, and §408.222, *Attorney's Fees Paid to Defense Counsel*, require the commissioner of workers' compensation to approve attorney fees for representing a claimant or defending an insurance carrier in a workers' compensation action. Chapter 152 implements the requirements set out in these sections. The repeal and re-enactment of §152.3 and §152.4 is necessary to update the attorney fee rules for the first time since 1991. The scope of the amendments required to reflect changes in the industry over the 25 years since the rules were originally adopted necessitate the repeal. The repeal is also necessary to permit the simultaneous adoption of new §152.3 and §152.4.

Under new §152.6, attorneys are required to comply with the Texas Disciplinary Rules of Professional Conduct when withdrawing representation. The requirements of new §152.6 are necessary to help prevent an attorney's withdrawal from having a materially adverse effect on a client, which is a violation of the Texas Disciplinary Rules of Professional Conduct. Additionally, the notification requirement will help the division track representation within the system, ensure communication with the correct parties, and inform the division when an injured employee may need assistance from the Office of Injured Employee Counsel (OIEC).

An informal working draft of the rule text was published on the division's website on April 1, 2016, and an informal stakeholder meeting was held April 25, 2016. The division received 47 comments.

The repeal of §152.3 and §152.4 becomes effective January 30, 2017, when the new §152.3, §152.4, and §152.6 rules become effective.

Section 152.3 addresses Approval or Denial of Fee by the Division. New §152.3(a) requires an attorney to submit a complete and accurate application for attorney fees in order to claim a fee. This application must be in the form and manner prescribed by the division. New §152.3(a) helps ensure the division receives the necessary information to fulfill its duties under Labor Code §408.221 and §408.222 to approve attorney fees, and that the information provided is not misleading or incorrect. Receiving the information necessary in the form of an application helps the division to process requests for attorney fees in an efficient and timely manner. The division has provided the DWC Form-152, *Application for Attorney Fees*, as a standardized form for attorneys to request attorney fees. The application may be submitted in paper form by hand delivery, mail, or facsimile, or it may be submitted through the Web-Enabled Attorney Fee Processing System (WAFPS). Attorneys can access WAFPS after submitting the DWC Form-151, *Attorney Application for Web Access*, and receiving an access code.

New §152.3(b) specifies the information that an attorney must provide to the division on an application for attorney fees, and is substantially similar to previous requirements. New §152.3(b)(1) and (2) require each attorney's name and bar card number, as well as the law firm's name, phone number, and mailing address. This information is necessary for efficient processing of attorney fee requests and to help the division identify not only the requestor, but where to direct payment of approved fees. New §152.3(b)(3) and (4) require the injured employee's name, date of injury, and DWC claim number, and when applicable, the beneficiary's name, type, contact information, and social security number. This information is necessary to ensure the requested attorney fees are properly attributed to the correct claimant. New §152.3(b)(5) requires the dates of legal service for the application. This information is necessary to help the division collect data relating to attorney fees and track representation within the workers' compensation system. This information also helps the division protect against mistaken or fraudulent billing, including duplicate bills, by specifying the dates of service to which the application applies. New §152.3(b)(6) requires the hourly rate and number of hours for each attorney and legal assistant providing services, and new §152.3(b)(7) requires an itemized list of the services performed and expenses incurred, the attorney or legal assistant who provided the service, the date it was provided, and the hours or amount requested. This information is necessary to determine the time and labor required to represent the claimant or insurance carrier, a factor Labor Code §408.221(d) and §408.222(b) require the division to consider in approving an attorney's fee. For purposes of billing under the guidelines for legal services, the itemized list of the services performed and expenses incurred should identify the type of action performed. The division emphasizes that, under this subsection, an attorney is not required to provide any information considered privileged or confidential. New §152.3(b)(6) and (7) are also necessary to determine compliance of an application for attorney fees with the hourly rate and the guidelines for legal services established in new §152.4. New §152.3(b)(8) requires a certification that every statement, numerical figure, and calculation in the application is within the attorney's personal knowledge, is true and correct, and represents services, charges, and expenses provided by the attorney or a legal assistant under the attorney's supervision. The certification is necessary to ensure the application

for attorney fees contains true and correct information. Under Labor Code §408.221(b) an attorney's fee is based on the attorney's time and expenses according to written evidence provided to the division. The division relies on this written evidence of an attorney's fee when approving, partially approving, or denying an application. Therefore it is essential the information contained in an application is accurate. The attorney is in the best position to know whether the application is reflective of the accurate time and expenses, and so it is the attorney's responsibility to ensure the application is correct. New §152.3(b)(9) requires additional case-specific justification for any fee request that would exceed the guidelines for legal services contained in §152.4(c). This paragraph is necessary to ensure the division receives the justification required under new §152.4(b) when an attorney is requesting hours that exceed the guidelines for legal services. The justification is necessary for the division to determine whether the circumstances of the case warrant an exception to the number of hours provided for in §152.4(c). The division emphasizes that whether the attorney requests to exceed the guidelines for legal services in a single application, or over the course of multiple applications, additional case-specific justification for the fee request is required. If justification is not included, the portion of the fee request exceeding the guidelines for legal services may be denied automatically.

New §152.3(c) provides that the division may approve, partially approve, or deny an application based on the division's determination whether the requested time and expenses are reasonable according to new §152.4, Labor Code §408.221 and §408.222, and the written evidence presented to the division. New §152.3(c) further explains that the division will then issue an order approving, partially approving, or denying the application. This subsection is necessary to inform system participants of the possible outcomes of the division's review of an application for attorney fees and the factors the division will take into consideration when evaluating fee requests. Informed system participants will help the application process and workers' compensation system, generally, run more efficiently and effectively by limiting submission of applications that are incomplete or lacking sufficient justification. Additionally new §152.3(c) reminds attorneys that, as system participants, they are subject to review for compliance under Labor Code Chapter 414, and the issuance of a division order approving, partially approving, or denying an application for attorney fees does not limit the commissioner's enforcement authority. Labor Code §414.002(a), *Monitoring Duties*, requires the division to monitor for compliance with commissioner rules, the Texas Workers' Compensation Act (Act), and all laws relating to workers' compensation, the conduct of persons subject to the Act. Under §414.002(a), persons to be monitored include attorneys and other representatives of parties. Additionally, §414.002(b) requires the division to monitor the conduct described in Labor Code §415.001, *Administrative Violation by Representative of Employee or Legal Beneficiary*, and Labor Code §415.002, *Administrative Violation by Insurance Carrier*. Labor Code §415.001 and §415.002 make it an administrative violation to violate a commissioner rule. New §152.3(c) is necessary to remind attorneys of the division's enforcement authority, including the statutorily imposed duty to monitor attorneys for compliance, and emphasize that the issuance of an order in response to an application for attorney fees is not a defense against any administrative violations attached to that application or the actions of the attorney in submitting it. Last, new §152.3(c) states that at any time the division may refer an attorney whose application is found to contain false or inaccurate information

to enforcement or other authorities, including licensing agencies, district and county attorneys, or the attorney general for investigation and appropriate proceedings. This subsection is necessary to remind attorneys of the division's statutory authority to refer persons to other authorities under Labor Code §414.006, *Referral to Other Authorities*.

New §152.3(d) requires an attorney, claimant, or insurance carrier to request a contested case hearing (CCH) in order to contest a division order approving, partially approving, or denying an application for attorney fees. Submission of an application requesting fees for the same services or expenses addressed in any previous application is prohibited. This subsection is necessary to emphasize that resubmitting an application, or submitting a second application that includes requested fees for the same services or expenses addressed in a previous division order, is prohibited. A request for a CCH must comply with the dispute resolution process outlined in 28 TAC Chapters 140 - 144 and must be made no later than the 20th day after receipt of the order. It is necessary for the request to be made according to the established dispute resolution process to ensure timely and efficient resolution of disputes, and to further the division's duty under Labor Code §402.021(b)(8) to effectively educate and clearly inform participants of their rights, their responsibilities, and how to appropriately interact within the system. Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department*, obligates the division to resolve disputes promptly and fairly when implementing the goals of the workers' compensation system. Requiring that a request for a CCH follow the established dispute resolution process helps the division meet the requirements of the Labor Code and encourages efficiency within the workers' compensation system. It is necessary for the division to receive the request for a CCH within 20 days after receipt of the order to ensure prompt resolution of any disputes and prevent issues from becoming stale. It is also necessary to conform to similar division dispute processes while allowing sufficient time for parties to receive notice, consider the options available, and, when applicable, make the necessary request. Additionally, the division recognizes that previous regulations required attorneys to send a copy of the application for attorney fees to their client at the same time as submitting it to the division, and allowed for 15 days to contest a fee after receipt of the order. Under new §152.3(a), attorneys are no longer required to send a copy of the application for attorney fees to the client because the Attorney Fees Processing System (AFPS) allows for issuance of an order in response to an application on the same day it is submitted. Thus, a client could receive the copy of the application at the same time as the corresponding division order, which fails to provide any additional notice to the attorney's client. By allowing for 20 days following receipt to contest an order, the division is aligning the process with similar dispute timeframes found in the rules and providing for a more efficient application process overall. A request for a CCH by the attorney or insurance carrier must be submitted by personal delivery, first class mail, or facsimile to the division, and a copy must be sent to the other parties by personal delivery, first class mail, or electronic transmission on the same day it is submitted to the division. It is necessary for a request for a CCH to be made by personal delivery, first class mail, or facsimile to ensure the division receives it in a timely manner and is able to begin the dispute resolution process immediately. It is necessary for a copy of the request for a CCH to be sent to the other parties by personal delivery, first class mail, or electronic transmission to put all parties to a dispute on notice of the issue and avoid any *ex parte* communications, which are prohibited under Labor Code §410.167, *Ex*

Parte Contacts Prohibited. Electronic transmission is defined in 28 TAC §102.4(m), *General Rules for Non-Commission Communication*, as transmission of information by facsimile, electronic mail, electronic data interchange, or any other similar method and does not include telephonic communication. Therefore, unlike the requirements for submitting the request to the division, an attorney may e-mail a copy of the request to the other parties. A claimant may request a CCH by contacting the division in any manner. Allowing a claimant to request a CCH by contacting the division in any manner is necessary to help further the basic goals of the system found in Labor Code §402.021, including ensuring each injured employee has access to a fair and accessible dispute resolution process. A simplified process for requests helps provide access to claimants disputing their attorney's fees, who are often unrepresented on this issue.

New §152.3(e) requires an attorney, claimant, or insurance carrier who wishes to contest a division order after a CCH under subsection (d) to request review by the appeals panel. This is necessary to inform system participants of the dispute resolution process following a CCH on an issue. It is also necessary to further the division's duty under Labor Code §402.021(b)(8) to effectively educate and clearly inform participants of their rights, their responsibilities, and how to appropriately interact within the system. New §152.3(e) further states a request for review by the appeals panel must be made pursuant to the provisions of §143.3, *Requesting the Appeals Panel to Review the Decision of the Hearing Officer*. It is necessary that the request for review be made in accordance with §143.3 to help promptly and efficiently resolve the dispute. Labor Code §402.021 requires that the division resolve disputes promptly and fairly when implementing the goals of the workers' compensation system. Requiring that a request for review by the appeals panel follow the established dispute resolution process helps the division meet the requirements of the Labor Code and encourages efficiency within the workers' compensation system.

New §152.3(f) provides that a division order approving, partially approving, or denying an application for attorney fees is binding during a contest or an appeal. Additionally, the insurance carrier is not relieved of the obligation to pay attorney fees according to the division order despite a contest or appeal. Labor Code §415.021(a), *Assessment of Administrative Penalties*, states that a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with the Act or a rule, order, or decision of the commissioner. This subsection is necessary to ensure parties comply with the division order approving, partially approving, or denying an application for attorney fees until a subsequent decision or order requires otherwise.

New §152.3(g) provides that a final order or decision will be issued by the division following a contest or appeal under subsection (d) or subsection (e). This subsection is necessary to inform system participants of the outcome of a contest or appeal under the attorney fee rules and their rights in accordance with Labor Code §402.021. New §152.3(g) further states that when a final order or decision requires an attorney to reimburse funds, reimbursement must be made no later than 15 days after receipt of the final order or decision. It is necessary for an attorney to reimburse funds within 15 days of receipt of the final order or decision to accomplish timely recovery of the client's overpaid funds. In cases where a claimant's attorney is involved, timely recovery of the overpaid funds is important as the funds are part of the injured employee or beneficiary's benefits.

New §152.3(h) establishes a delayed effective date for §152.3 of January 30, 2017. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the repeal and re-enactment of §152.3. The division emphasizes that attorney and legal assistant services rendered prior to January 30, 2017, must be billed in accordance with existing §152.3. An application for attorney fees may not contain dates of legal services spanning across the effective date. Therefore, one application must be submitted for services rendered as of January 30, 2017, and a separate application must be submitted for services provided prior to and including January 29, 2017. This subsection is necessary to inform system participants of the effective date of new §152.3.

Section 152.4 addresses Guidelines for Legal Services Provided to Claimants and Carriers. New §152.4(a) outlines the different factors the division will consider when determining the reasonableness of a request for attorney fees. Based on the guidelines for legal services, the maximum hourly rate for legal services, the criteria outlined in Labor Code §408.221 and §408.222, and the written evidence presented, the division will approve, partially approve, or deny the request for attorney fees. This subsection is necessary to inform system participants what factors the division will take into consideration when evaluating the fee request. Informed system participants help the processing of applications for attorney fees and the workers' compensation system run more efficiently and effectively by limiting the submission of applications that are incomplete or lacking sufficient justification.

New §152.4(b) allows an attorney to request additional hours that exceed the guidelines for legal services if the attorney demonstrates that the higher fee was justified based on the circumstances of the claim and the factors laid out in Labor Code §408.221 and §408.222. The division emphasizes that whether the attorney requests to exceed the guidelines for legal services in a single application or over the course of multiple applications additional case-specific justification for the fee request is required. If a justification is not included, the portion of the fee request exceeding the guidelines for legal services may be denied automatically. This subsection is necessary to account for circumstances where the case-specific considerations, such as the novelty and difficulty of the questions involved in the dispute, warrant additional hours.

New §152.4(c) establishes the guidelines for legal services provided to claimants and insurance carriers. Figure: 28 TAC §152.4(c) includes the allotted maximum hours for each service the division has identified as part of the attorney's representation. The figure reads as follows: one hour for initial interview and research; half of an hour for setting up the file and completing and filing forms; three hours each month for communications with the client, health care providers, and other persons involved in the case; three and a half hours each month for direct dispute resolution negotiation with the other party; two hours for preparation and submission of an agreement or settlement; the actual time in a benefit review conference (BRC) plus two additional hours for participation in a BRC; the actual time in the CCH plus four additional hours for participation in a CCH; five hours for participation in the administrative appeal process; and the actual costs that are reasonable and necessary for travel each month. This subsection is necessary to help fulfill the division's statutory duty to provide guidelines for maximum attorney fees for specific services, and is substantially similar to the previous requirements. In setting the maximum

hours for each legal service, the division began by considering the applicable factors laid out in Labor Code §408.221, including the skill, time, and labor required to perform each specific legal service properly. The division then considered system goals, such as minimizing the likelihood of disputes by emphasizing informal mediation rather than litigation, providing injured employees with access to a fair and accessible dispute resolution process, and resolving disputes promptly and fairly when they do arise. Additionally, the division looked to the guidelines for legal services that have been in place since 1991. While the guidelines for legal services are substantially similar to previous requirements, additional hours have been allotted for direct dispute resolution negotiation, communications, and preparation and submission of an agreement or settlement form. These additional hours are necessary to encourage both early communication between the parties and resolution of disputes before the parties enter the formal administrative resolution process. The guidelines for legal services are intended to encourage early resolution of claim disputes by allowing time each month for activities such as communications with the client and other persons and negotiating with the other party. When negotiations are successful, a separate two hours are provided for the preparation and submission of an agreement or settlement. When they are not, hours have been allotted for the BRC and CCH stages of the dispute resolution process. At the BRC and CCH stage, actual time in each proceeding as well as two and four hours for preparation, respectively, have been allotted based on previous requirements, the goals of the workers' compensation system, and the factors in Labor Code §408.221 and §408.222. Last, five hours have been provided for participation in the administrative appeal process to account for disputes that are not resolved at the end of a CCH. Each of the service categories contained in the guidelines for legal services is necessary to allow time for attorney preparation and participation at each stage of representation, including initial interview, research and setting up the client's file, and the workers' compensation dispute resolution process. The service categories were determined based on a balancing of the system goals described above, the requirements of Labor Code §408.221 and §408.222, and the guidelines provided in previous regulations.

New §152.4(d) establishes a maximum hourly rate reasonable for workers' compensation disputes in Texas of \$200 for attorneys and \$65 for legal assistants (not to include hours for general office staff). This subsection is necessary to help fulfill the division's statutory duty to provide guidelines for maximum attorney fees for specific services. In setting the maximum hourly rate for legal services, the division considered the factors established in Labor Code §408.221(d), which include: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal services properly; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved in the controversy; (6) the benefits to the claimant that the attorney is responsible for securing; and (7) the experience and ability of the attorney performing the services. Labor Code §408.221(d) and §408.222(b) require the division to consider these factors when approving an attorney's request for attorney fees. According to the Texas Workforce Commission, the median hourly wage for all attorneys in 2014 was \$57.00 and for legal assistants it was \$24.93 (<http://www.texaswages.com/index3.aspx>). The State Bar of Texas Department of Research & Analysis provides a median hourly rate for attorneys in private practice of \$242 in 2013 (<https://www.texasbar.com/AM/Template.cfm?Section=Demo->

graphic_and_Economic_TrTren&Template=/CM/ContentDisplay.cfm&ContentID=27264) and §121 for paralegals in 2014 (<https://txpd.org/files/file/SalarySurvey/2014%20Salary%20Survey%20Results%20Final.pdf>). While these numbers are helpful to quantify some of the factors required by Labor Code §408.221 and §408.222, namely the fee customarily charged in the locality for similar legal services, they are just one factor of the larger consideration by the division in fulfilling its statutory duty. Therefore, the division balanced the above numbers against other factors, including system goals, such as encouraging early resolution of disputes, providing access to effective attorney representation, limiting the adverse effect of attorney fee liens on a claimant's ability to obtain quality legal representation later in a dispute, the administrative nature of the workers' compensation dispute resolution process, and the statutory provision limiting attorney's fees to 25 percent of the injured employee's recovery. The division also considered Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims. After balancing the above considerations, the division determined that \$200 an hour for attorneys and \$65 an hour for legal assistants is the maximum hourly rate reasonable for workers' compensation disputes in Texas.

New §152.4(e) requires attorneys to bill using their own state bar card number. This subsection is necessary to help the division monitor against fraud and improper billing practices by requiring attorneys to use their own bar card number when requesting attorney fees. Providing a uniform, single identifier ensures that requested hours are attributed accurately to each attorney.

New §152.4(f) establishes a delayed effective date for §152.4 of January 30, 2017. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the repeal and re-enactment of §152.4. The division emphasizes that attorney and legal assistant services rendered prior to January 30, 2017, must be billed in accordance with existing §152.4. An application for attorney fees may not contain dates of legal services spanning across the effective date. Therefore, one application must be submitted for services rendered as of January 30, 2017, and a separate application must be submitted for services provided prior to and including January 29, 2017. This subsection is necessary to inform system participants of the effective date of new §152.4.

Section 152.6 addresses Attorney Withdrawal. New §152.6(a) requires an attorney to submit a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (d) when withdrawing representation. This is necessary to inform system participants of the differing requirements of withdrawal. The specific explanation and justification for both subsection (b) and subsection (d) are included below. New §152.6(a) also requires an attorney to comply with the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas when withdrawing representation. Labor Code §415.021(a) states it is an administrative violation for a person to violate, fail to comply with, or refuse to comply with, the Act or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a representative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. 28 TAC §150.1, *Minimum Standards of Practice for an Attorney*, requires an attorney in practice before the division to observe the rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation

for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct governs declining or terminating representation. As such, new §152.6(a) emphasizes that attorneys in the workers' compensation system must comply with Rule 1.15 when withdrawing representation of a claimant or an insurance carrier. This section is necessary to emphasize that failure to comply with the Texas Disciplinary Rules of Professional Conduct when withdrawing is an administrative violation that may be referred to enforcement or other authorities. Additionally, §152.6 reiterates the Texas Disciplinary Rules of Professional Conduct requirement to surrender papers and property to the client upon withdrawal. This subsection is necessary to emphasize the requirement in Rule 1.15(c) and help ensure that claimants and insurance carriers obtain the portion of the case file they are entitled to. The proper transfer of appropriate papers and property to the client helps the transition between attorneys or to an OIEC ombudsman move more quickly and smoothly and contributes to an overall efficient dispute resolution process.

New §152.6(b) addresses withdrawal before notice of a BRC or CCH is received and requires an attorney withdrawing representation to notify the division in the form and manner prescribed. New §152.6(b) requires notice of withdrawal in two circumstances. The first circumstance is any time the attorney may withdraw representation without a motion to withdraw described by subsection (d). The notice of withdrawal requirement is necessary to allow for better tracking and data on how attorneys are operating within the workers' compensation system; ensure the correct parties are receiving communications from the division; and to put the division on notice when an injured employee may need assistance from the OIEC. The second circumstance is any time the attorney's client terminates the attorney's representation. This subsection is necessary to ensure there is no delay in a claimant or insurance carrier's ability to obtain subsequent representation or assistance when they choose to discharge their attorney. Under these circumstances, notification is necessary to ensure the division has the required data to track the operation of attorneys in the system; ensure the correct parties are receiving communications from the division; and to put the division on notice that an injured employee may need assistance from OIEC. The division emphasizes that when new §152.6(b)(1) is applicable both the attorney and the attorney's client may terminate the attorney-client relationship with immediate effect. The required notice of withdrawal informs the division of a change in the representative relationship, but does not affect the date of termination.

New §152.6(c) states the notice of withdrawal must be provided to the division by personal delivery, first class mail, or facsimile no later than the 10th day following withdrawal, and the attorney must provide a copy of the notice to their client and opposing party by personal delivery, first class mail, or electronic transmission on the same day the notice is submitted to the division. It is necessary for the notice of withdrawal to be submitted to the division by personal delivery, first class mail, or facsimile to ensure the division receives the notification in a timely manner and is able to update the claimant or insurance carrier's representative information. It is necessary for the copy to be provided by these means to avoid any miscommunication or delay in the notice to the attorney's client or the opposing party. Section 102.4(m) defines electronic transmission as facsimile, e-mail, electronic data interchange, or any other similar method, but it does not include telephone communication. It is necessary for the division to receive timely notification of an attorney's withdrawal to allow for

better tracking and data on how attorneys are operating within the system; ensure the correct parties are receiving communications from the division; and to put the division on notice when an injured employee may need assistance from OIEC. It is necessary for the attorney's client and opposing party to receive a copy of the notice of withdrawal to ensure all parties are up to date on the representation involved in the dispute. The division has provided the DWC Form-150a, *Notice of Withdrawal of Representation*, as a standardized form for attorneys to notify the division of withdrawal of representation. The notice may be submitted to the division by personal delivery, mail, or facsimile. New §152.6(c) further specifies the information that an attorney must provide to the division on the notice of withdrawal. New §152.6(c)(1) and (2) require the attorney's name, bar card number, and contact information, as well as the law firm's name, when applicable. This information is necessary for the division to efficiently process attorney withdrawal notifications, ensure the system accurately reflects the claimant or carrier's current representation, if any, and properly process any future applications for attorney fees. New §152.6(c)(3) and (4) require the injured employee's information, including name, date of injury, and DWC claim number, and the beneficiary's information, when applicable. This information is necessary to ensure the correct claimant's information is properly updated to note the withdrawal of representation, and helps the division collect data and track representation of claimants in the workers' compensation system. New §152.6(c)(5) requires the insurance carrier name. This information is necessary to help the division collect data and track representation of carriers in the workers' compensation system. New §152.6(c)(6) requires the effective date of the attorney's withdrawal of representation. The effective date is necessary to ensure proper tracking of attorney representation within the system; facilitate processing of any future applications for attorney fees; and to verify the attorney met the requirement to submit the notification to the division within the 10 day period established by rule. The division emphasizes that the effective date of the attorney's withdrawal is the actual date the representative relationship ended under paragraph (1) or (2) of subsection (b), and it is not tied to the submission date of the notice of withdrawal. New §152.6(c)(7) requires the attorney's signature. The DWC Form-150a, *Notice of Withdrawal of Representation*, may also be used by the attorney's client to notify the division that the attorney-client relationship has been terminated. The attorney's signature is necessary to ensure the division can verify the party submitting the notice of withdrawal.

New §152.6(d) addresses withdrawal after notice of a scheduled BRC or CCH is received and before resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A - E. When new §152.6(d) applies, an attorney seeking withdrawal from representation may do so only after submitting a motion to withdraw and receiving a division order granting the motion. Labor Code §415.021(a) states that a person commits an administrative violation if they violate, fail to comply with, or refuse to comply with this subtitle or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a representative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. Section 150.1 requires an attorney in practice before the division to observe the rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Under the Texas Disciplinary Rules

of Professional Conduct, Rule 1.15, an attorney may not withdraw from representing a client unless withdrawal can be accomplished without material adverse effect on the interests of the client. Oftentimes, the withdrawal of an attorney prior to a scheduled BRC or CCH can lead to continuances, which delay the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affect the efficiency of the overall dispute resolution process. Unnecessary delays can also prevent injured employees from receiving needed medical attention, income benefits, or returning to work. Once a BRC or CCH has been scheduled by the division, the time for a new attorney or ombudsman to prepare for the proceeding after the current attorney has withdrawn is cut short and can affect the resolution of the dispute. Once the CCH is completed, the deadline to file a written request for appeals panel review is statutorily set and cannot be extended. Thus, an attorney's withdrawal during this time period may affect the client's ability to timely appeal the decision of the hearing officer. If neither party files a request for appeals panel review, the division's dispute resolution process has resolved the disputed issues. If a request for appeals panel review is filed and the appeals panel reverses the decision of the hearing officer and renders a new decision, or affirms the decision of the hearing officer, the division's dispute resolution process has resolved the disputed issues. Additionally, if at any time the parties resolve all of the disputed issues by agreement or settlement under Labor Code §410.029, the division's dispute resolution process has resolved the disputed issues. However, if the appeals panel reverses the decision of the hearing officer and remands the case for further consideration in accordance with Labor Code §410.203(b), a motion to withdraw is still required for an attorney to withdraw representation. Under Labor Code §410.203(d), a hearing on remand must be accelerated and the commissioner must adopt rules to give priority to hearings in these circumstances. Thus, an attorney's withdrawal after a decision has been remanded would provide little time for a new attorney or ombudsman to prepare for the proceeding and can affect the resolution of the disputed issues. If appeals panel review is requested by a party after the expedited, or accelerated, CCH, the appeals panel may either reverse and render a new decision or affirm the decision of the hearing officer. At this point, the division's dispute resolution process has resolved the disputed issues. This subsection is necessary to help prevent a materially adverse effect on the interests of claimants and insurance carriers by an attorney's withdrawal during the division's dispute resolution process. Additionally, continuances and delays during the dispute resolution process can negatively impact the effectiveness and fairness of the workers' compensation system. Labor Code §402.061, *Adoption of Rules*, provides the commissioner with authority to adopt rules as necessary for the implementation and enforcement of the Act. Labor Code §402.021(a)(2) states a basic goal of the workers' compensation system is that each injured employee must have access to a fair and accessible dispute resolution process, and (b)(5) establishes the prompt and fair resolution of disputes as another system goal. Labor Code §402.00128(b), *General Powers and Duties of Commissioner*, provides the commissioner with the power to hold hearings and to exercise other powers as necessary to implement and enforce the Act. Thus, new §152.6(d) is also necessary to help the division meet the statutorily imposed duty under Labor Code §402.021(a)(2) to provide a fair and accessible dispute resolution process and Labor Code §402.021(b)(5) to resolve disputes promptly and fairly.

New §152.6(e) requires that a motion to withdraw provide good cause for withdrawing from the case. Good cause is necessary to prevent a materially adverse effect on the attorney's client as a result of the withdrawal. As described above, the withdrawal of an attorney during the dispute resolution process may have a material adverse effect on the claimant and the insurance carrier. Therefore, the division requires good cause to show that the attorney's withdrawal from the case is warranted. This requirement is consistent with the Texas Disciplinary Rules of Professional Conduct, which state an attorney may not withdraw representation unless withdrawal can be accomplished without a material adverse effect on the interests of the client. Texas Disciplinary Rule 1.15(c) states a lawyer shall continue representation notwithstanding good cause for terminating the representation when ordered to do so by a tribunal. New §152.6(e) simply requires a showing of good cause to withdraw during the dispute resolution process. New §152.6(e) further requires the motion to withdraw include a certification that the attorney's client has knowledge of and has approved, or refused to approve, the withdrawal or that the attorney made a good faith effort to notify the client and the client could not be located. The certification is necessary to ensure the participants, namely the attorney and the attorney's client, are communicating with one another and to provide information necessary under new §152.6(g)(5) when the hearing officer considers the motion to withdraw. The division emphasizes that the client's approval of an attorney's withdrawal is not the same as the client's termination of the attorney-client relationship under new §152.6(b)(2).

New §152.6(f) requires the attorney submit the motion to withdraw to the division by personal delivery, first class mail, or facsimile, and to provide a copy of the motion to the attorney's client and the opposing party. It is necessary for the motion to withdraw to be submitted to the division by personal delivery, first class mail, or facsimile to help ensure the division receives and considers the motion in a timely manner. It is necessary for the attorney's client and opposing party to receive a copy of the motion to withdraw to ensure all parties are up to date on the representation involved in the dispute and to avoid any ex parte communications, which are prohibited under Labor Code §410.167. The copy must be provided by personal delivery, first class mail, or electronic transmission on the same day the motion is submitted to the division. It is necessary for the copy to be provided by these means to avoid any miscommunication or delay in the notice to the attorney's client or the opposing party. Electronic transmission is defined in §102.4(m) as transmission of information by facsimile, electronic mail, electronic data interchange, or any other similar method and does not include telephonic communication. Therefore, unlike the requirements for submitting the motion to the division, an attorney may e-mail a copy of the motion to the other parties.

New §152.6(g) outlines the factors the hearing officer will rely on in determining whether good cause exists for the attorney's withdrawal, beginning with Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct. This subsection is necessary to inform system participants how a hearing officer determines whether to approve or deny a motion to withdraw. The considerations are necessary to help protect the attorney's client from experiencing a material adverse effect due to the attorney's withdrawal. Labor Code §415.021(a) states that a person commits an administrative violation if they violate, fail to comply with, or refuse to comply with this subtitle or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a repre-

sentative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. Section 150.1 requires an attorney, in practice before the division to observe the rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct governs declining or terminating representation. It is necessary for the hearing officer to begin by considering Rule 1.15 to help ensure the attorney is not committing an administrative violation by withdrawing representation at that time. New §152.6(g)(1) states the hearing officer will consider how close in time the withdrawal is to the scheduled BRC or CCH. Oftentimes, the withdrawal of an attorney prior to a scheduled BRC or CCH can lead to a continuance, which delays the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affects the efficiency of the overall dispute resolution process. Unnecessary delays can also prevent injured employees from receiving needed medical attention, income benefits, or returning to work. Once a BRC or CCH has been scheduled by the division, the time for a new attorney or ombudsman to prepare for the proceeding once the current attorney has withdrawn is cut short and can affect the resolution of the dispute. This paragraph is necessary to help ensure the attorney's withdrawal is not so close in time as to lead to a rescheduled dispute proceeding or continuance. New §152.6(g)(2) and (3) state the hearing officer will consider the amount of attorney fees that have been requested and approved, as well as the attorney's willingness to waive payment of any portion of the approved fees outstanding at the time of withdrawal. Under Labor Code §408.221, a claimant attorney's fee is paid out of the claimant's recovery and may not exceed 25 percent of the recovery. Under Labor Code §408.203, *Allowable Liens*, any unpaid income or death benefits are subject to liens for attorney fees. Because attorney fees are capped at 25 percent of each income or death benefit check, there are often approved attorney fees operating as a lien on the claimant's benefits, sometimes through exhaustion of the available benefits. Therefore, unless an attorney is willing to waive outstanding fees when withdrawing from a case, any subsequent attorney will only receive a fee for representing the claimant after the original lien has been paid out. This can operate as a hindrance to injured employees and beneficiaries seeking access to an attorney in their dispute. The workers' compensation dispute resolution process does not require attorney representation in order for injured employees or beneficiaries to navigate their claim or obtain effective assistance, or any party to obtain private counsel. The OIEC ombudsman program is available to assist injured employees, and parties are able to obtain other forms of qualifying non-attorney representation. The considerations in new §152.6(g)(2) and (3) are necessary to help enable claimants in the system who want attorney representation to obtain a subsequent attorney if their current attorney withdraws. New §152.6(g)(4) considers the attorney's reason for withdrawing representation. This consideration is necessary as a corollary to Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct. Under Rule 1.15, there are specific circumstances where an attorney is required to withdraw or is permitted to withdraw barring an order stating otherwise from a tribunal. This paragraph is necessary to encompass those reasons and put the hearing officer on notice of the attorney's reason for withdrawing representation during the dispute resolution process. However, the division emphasizes that an

attorney is not required to provide any information that is considered privileged or confidential in stating the reason for withdrawal. Finally, new §152.6(g)(5) considers whether the attorney's client refused to approve the withdrawal. New §152.6(e) requires the motion to withdraw to include a statement reflecting whether the attorney's client has approved or refused to approve the withdrawal, unless the attorney certifies a good faith effort to notify the client regarding the withdrawal was made and the client could not be located. It is necessary for the hearing officer to consider whether the attorney's client has refused to approve the withdrawal, where applicable, to provide the claimant or insurance carrier an opportunity for their position to be heard. A consideration of good cause that includes the claimant or insurance carrier's voice helps encourage communication within the representation relationship and the workers' compensation system as a whole, as well as notify the hearing officer that there is a possible material adverse effect to the client if withdrawal occurs at that time.

New §152.6(h) requires an attorney to continue to represent the client until resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A - E. Rule 1.15(c) of the Texas Disciplinary Rules of Professional Conduct states that a lawyer shall continue representation notwithstanding good cause for terminating the representation when ordered to do so by a tribunal. Under the Texas Disciplinary Rules of Professional Conduct, a "tribunal" is defined as any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy and includes administrative agencies when engaging in adjudicatory activities, arbitrators, mediators, hearing officers, and comparable persons. New §152.6(e) requires a motion to withdraw show good cause for withdrawing from the case during the dispute resolution process, and is necessary to prevent a materially adverse effect on the attorney's client. It is necessary for an attorney to continue representation if their motion to withdraw is denied because withdrawal at that point would have a material adverse effect on the client that is not otherwise justified. This subsection tracks the requirements of the Texas Disciplinary Rules of Professional Conduct.

New §152.6(i) clarifies that nothing in §152.6 prevents a client from terminating the attorney-client relationship with immediate effect, or notifying the division of the termination of the attorney-client relationship. This subsection is necessary to emphasize that when the attorney's client terminates the representative relationship, these rules should not hinder the claimant or insurance carrier from obtaining immediate subsequent assistance from OIEC or representation from another attorney. Additionally, under §152.6(b) the attorney has 10 days to meet the requirement of submitting a notice of withdrawal. However, the client may seek immediate assistance from OIEC or subsequent representation following the attorney's withdrawal. In these instances, the attorney's client should not be prevented from notifying the division and obtaining assistance from OIEC or subsequent representation just because the attorney has not yet submitted the notice of withdrawal. Lastly, the division emphasizes that new §152.6(i) still requires the attorney to submit a notice of withdrawal under §152.6(b), regardless of whether the attorney's client has provided notification. This requirement helps to ensure the division is receiving the necessary information for tracking and data on how attorneys are operating within the system; to ensure the correct parties are receiving communications; and to provide consistent and clear application of the requirements. Consistent and clear application of the withdrawal re-

quirements is necessary to ensure the division is receiving all of the requested information on the DWC Form-150a. While an injured employee, beneficiary, or insurance carrier may submit the form to the division, participants other than the attorney are not required to. Therefore, new §152.6(i) requires attorneys to always submit the notice of withdrawal when applicable and helps ensure the division is receiving all of the necessary required information established in new §152.6(b).

New §152.6(j) establishes a delayed effective date for §152.6 of January 30, 2017. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the new requirements contained in §152.6. This subsection is necessary to inform attorneys when the requirements of §152.6, including a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (e), become effective.

Kerry Sullivan, Deputy Commissioner for Hearings, has determined that for each year of the first five years the new sections are in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposed new sections. Any economic costs to those state and local governments that provide workers' compensation coverage are discussed below.

Mr. Sullivan has also determined that for each of the first five years new §152.3, §152.4, and §152.6 are in effect there will be a number of public benefits. The public benefits anticipated as a result of the proposed sections include: (i) helping to ensure there is quality representation available within the workers' compensation system; (ii) allowing for additional time at the beginning of a dispute for preparation and case management in order to encourage early resolution of claim disputes; (iii) helping to prevent an attorney's withdrawal from having a material adverse effect on their client; (iv) establishing clear and consistent guidelines for submission of required information and requests; (v) resolving disputes fairly and promptly by minimizing delays and continuances in the dispute resolution process; (vi) ensuring injured employees have access to a fair and accessible dispute resolution process by protecting against disparate impact between parties, and; (vii) educating and clearly informing system participants of their rights under the system by providing for consistent notice of all disputes and issues.

Mr. Sullivan anticipates that, for each of the first five years new §152.3, §152.4, and §152.6 are in effect, there will be costs to persons required to comply with the new sections. The division notes that many of these costs, particularly under new §152.3 and §152.4, are substantially similar to the costs experienced under repealed §152.3 and §152.4.

New §152.3(a) requires an attorney to submit an application for attorney fees to the division in order to request a fee. Labor Code §408.221 and §408.222 require the division or court to approve all attorney fees based on written evidence presented to the division. Thus, the only costs to an attorney resulting from new §152.3 are the actual costs relating to submitting the application to the division. There are a number of options available to the attorney for submitting the application, including the free online WAFPS. The proposed subsection allows the attorney the flexibility to determine which allowable method of submission to use when requesting a fee, and costs will vary depending on the method the attorney chooses. If an attorney decides to mail, facsimile, or personally deliver the application there is an estimated printing cost associated of \$.10 per 8.5 x 11" piece of paper. A

blank application for attorney fees is five pages in length and, when printed front and back, would result in a printing cost of approximately \$.30 per application. If an attorney decides to mail the application there is also a mailing cost of approximately \$.47 per application. Additionally, the division notes that the proposed subsection provides flexibility for the attorney to determine how often to submit the application for attorney fees, and costs will vary depending on the frequency the attorney chooses.

New §152.3(d) and (e) require a party other than the claimant, such as the attorney or the insurance carrier, who contests an attorney fee order to request a CCH or an appeals panel review, respectively. The request must be submitted to the division by personal delivery, first class mail, or facsimile. Thus, there is a printing cost associated of approximately \$.10 per 8.5 x 11" piece of paper for any requests submitted to the division under (d) or (e). If the party mails the request to the division, there is also a mailing cost of approximately \$.47. Additionally, (d) and (e) require a copy be sent to the other parties, including the claimant, attorney, and insurance carrier. Under §152.3(d), the copies may be sent at no cost by email. However, if the copies are sent by one of the other available means there are printing and mailing costs associated, which are consistent with those described above, for each required party. The division also recognizes that there may be costs to parties under new §152.3 resulting from the time it takes to complete the request for a CCH or review by the appeals panel. However, these costs are not feasible for the division to quantify, as the party is in the best position to determine the time it will take to fulfill the requirements. Additionally, costs may vary depending on the complexity of the circumstances or the person's familiarity with the processes. Parties who opt to request a CCH under new §152.3 may incur certain legal costs or costs in the form of time as a result of attending these hearings. However, these costs are ultimately the result of division policies regarding the rights of parties to request CCHs, and are substantially similar to the costs associated with the processes found in repealed §152.3.

New §152.4 establishes the maximum hourly rate for attorneys and legal assistants, as well as the legal services guidelines outlining the services and hours that may be requested. Mr. Sullivan anticipates that there will be probable costs to the workers' compensation system as a result of the repeal and re-enactment because new §152.4 increases the maximum hourly rate for attorneys and legal assistants, and includes increased hours under the legal services guidelines. Specifically, the maximum hourly rate will increase by \$50 for attorneys and \$15 for legal assistants with the repeal and re-enactment of §152.4. Additionally, amendments to §152.4(c) increase the number of hours an attorney may request for communications per month (with client, health care providers, or other persons involved in the case) by 30 minutes, for direct dispute resolution negotiation per month by 30 minutes, and for preparation and submission of an agreement or settlement by one hour. It is challenging for the division to estimate the exact fiscal impact of the repeal and re-enactment to claimants and insurance carriers for a number of reasons. For example, to estimate the fiscal impact, the division must rely on past billing behavior; however, increases in the hourly rate and guidelines for legal services may result in a change in billing behavior, which would affect any calculation of costs. Additionally, the division anticipates the increase in costs to claimants and insurance carriers will be at least partially offset by the quicker resolution of cases resulting from increased available hours at the front end of the dispute resolution process. Last, the division is able to determine the total amount of attorney fees approved,

but does not have available data on the total amount of attorney fees actually paid out in the system. For claimant attorneys, this is due in part to the statutory cap of 25 percent found in Labor Code §408.221, which only allows 25 percent of each benefit check to be allocated to attorney fees and does not provide for further recovery of any outstanding approved balance once the benefits are exhausted. For insurance carrier attorneys, there are often contracts between the attorney and the insurance carrier that provide for a fee below the amount approved by the division. Essentially, the division may approve a specific amount of fees, but the division does not have information on the actual fees paid out by the parties, which is often less than what was approved. There are also no previous amendments for the division to base an estimate of costs on, as the rules have been in place since originally adopted in 1991. All of these circumstances operate to hinder the division's ability to provide an exact estimate of the costs to participants and the system as a whole that would result from the increase in the hourly rate and guidelines for legal services. However, the division can provide estimates based on the information readily available, including the total amount in attorney fees approved each year, which is subject to the 25 percent statutory cap for claimant attorneys and contracts for insurance carrier attorneys, and the total amount that could possibly be requested if billing behavior were to change and attorneys began billing at the maximum allowable rate and hours.

For attorney fees, the division estimates that the total amount approved by the division would increase by approximately \$20 million per year. The division reached this estimate by relying on past billing behavior and the total number of approved hours in Calendar Year 2015; multiplying the difference in the maximum hourly rate, \$50, by the total number of approved attorney fees in 2015. Overall, at a new hourly rate of \$200—multiplied by the 2015 approved hours—the division would approve approximately \$81 million in attorney fees. For legal assistants, the division estimates an increase of approximately \$1.2 million per year as a result of the repeal and re-enactment of §152.4. This estimate is based on multiplying the difference in the maximum hourly rate, \$15, by the total number of approved hours of legal assistant fees in 2015. Another approach the division took to estimate the impact was to look at the total amount of attorney fees that could possibly be billed in the system. This estimate does not take into account actual billing practices, such as the total number of hours actually billed or the current data showing that attorneys do not bill the maximum amount of hours allowed in every dispute. Instead, this estimate focuses on the total amount that could be billed by multiplying the new hourly rate of \$200 by the new maximum number of hours allowed in the legal services guidelines. Per dispute, a total of approximately \$4,200 can be billed under new §152.4, which is an increase of \$1,350 from the repealed version. If billing behavior were to change and attorneys began billing at or near the maximum hours allowed in the guidelines for legal services, as well as the maximum hourly rate each time, a total of approximately \$152 million could be billed in the workers' compensation system under new §152.4. This is a change of approximately \$50 million from the repealed rule. Finally, new §152.4(b) allows attorneys to request hours above the guidelines for legal services when case-specific justification is attached. An additional cost of \$200 per additional hour would be applicable in those instances where additional hours are requested and approved by the division.

New §152.6(b) and (d) require an attorney to submit a notice of withdrawal or a motion to withdraw, respectively, to the division when withdrawing their representation. There is a printing cost

associated with the notification and motion of \$.10 per 8.5 x 11" piece of paper, and when mailed, a mailing cost of approximately \$.47. Under (b) and (d), the notification and motion must also be provided to the attorney's client and the opposing party. The proposed subsection allows the attorney the flexibility to determine which allowable method of submission to use when providing a copy of the notification or motion, and costs will vary depending on the method the attorney chooses. The copies may be sent at no cost by email. If the copies are sent by one of the other available means, there are printing and mailing costs associated, which are consistent with those described above, for each required party. The division also recognizes that there may be costs to attorneys under new §152.6 resulting from the time it takes to complete the notice of withdrawal or motion to withdraw. However, these costs are challenging for the division to quantify, as the attorney is in the best position to determine the time it will take to fulfill the requirements. Additionally, costs may vary depending on the complexity of the circumstances or the attorney's familiarity with each document.

Government Code §2006.002(c) provides that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees.

In accordance with Government Code §2006.002(c), the division has determined that the costs to comply with the proposed new sections may have an adverse economic impact on attorneys and insurance carriers who qualify as small or micro-businesses. According to the United States Census Bureau's North American Industry Classification System (NAICS), in 2014 there were 547,190 employers doing business in the state of Texas. Of those, 532,229 have 99 or less employees and 460,181 have 19 or less employees (<http://censtats.census.gov/cbp-naic/cbpnaic.shtml>). The division is not able to determine the total number of regulated entities that will be required to comply with §152.3 and §152.6 because information regarding attorney and insurance specific industries is not available. However, the cost of compliance with the proposal will not vary between large businesses and small or micro-businesses. Thus, the division's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal is equally applicable to small and micro-businesses.

Two possible alternative regulatory methods of achieving the purposes of the proposed sections without adversely affecting small or micro-businesses are (i) modifying the proposed requirements for small and micro-businesses; and (ii) exempting small or micro-businesses from the requirements of the proposed sections. Under Government Code §2006(c-1), an agency is required to consider alternative regulatory methods only if the alternative methods are consistent with the health, safety, environmental and economic welfare of the state. The division has determined that the proposed new sections substantially contribute to the economic welfare of the state and system participants by ensuring all parties to a dispute receive

notice regarding any new issues and avoid ex parte communications, which are prohibited under Labor Code §410.167. The purposes of the regulations also include furthering the system goals as laid out in Labor Code §402.021; resolving disputes fairly and promptly by minimizing delays in dispute resolution; ensuring injured employees have access to a fair and accessible dispute resolution process by protecting against disparate impact between parties; and educating and clearly informing system participants of their rights under the system by providing for consistent notice of all disputes and issues. Any variance in the requirements of §152.3 and §152.6 would defeat the purposes of the rules, would not be consistent with the economic welfare of the state, and would result in a disparate effect between parties to a dispute, particularly an attorney's client when an attorney fee order is being contested or the attorney is withdrawing representation. Additionally, in establishing the requirements the division has included less burdensome options for complying with many of the proposed new sections. In §152.3(a), an attorney may submit an application through WAFPS, which would eliminate the printing and mailing costs of submitting the application in a paper format. WAFPS is provided as a free online system for attorneys to submit applications for attorney fees. In §152.3(d), the party requesting a CCH to dispute an attorney fee order may provide copies to the other parties, including the insurance carrier, claimant, or their attorney, by email. In §152.6(b) and §152.6(d), an attorney may provide the required copies of the notice of withdrawal and motion to withdraw to their client and opposing party via email. Therefore, the division has determined that there are no regulatory alternatives, including waiving or modifying the requirements of proposed sections, which will sufficiently protect the health, safety, and economic welfare of the state.

The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on September 19, 2016. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to Rulecomments@tdi.texas.gov or by mail to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, the division will consider written comments and public testimony presented at the hearing.

28 TAC §152.3, §152.4

Existing §152.3 and §152.4 are repealed under the authority of Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking*; and Labor Code §402.061, *Adoption of Rules*.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

§152.3. Approval or Denial of Fee by the Commission.

§152.4. *Guidelines for Legal Services Provided to Claimants and Carriers.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2016.

TRD-201603998

Nicholas Canaday III

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

Earliest possible date of adoption: September 18, 2016

For further information, please call: (512) 804-4703



28 TAC §§152.3, 152.4, 152.6

New §§152.3, 152.4, and 152.6 are proposed under the authority of Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking*; Labor Code §402.061, *Adoption of Rules*, Labor Code §402.021, *Goals, Legislative Intent, General Workers' Compensation Mission of Department*; Labor Code §408.221, *Attorney's Fees Paid to Claimant's Counsel*; Labor Code §408.222, *Attorney's Fees Paid to Defense Counsel*; Labor Code §415.021, *Assessment of Administrative Penalties*; Labor Code §402.00128, *General Powers and Duties of Commissioner*; Labor Code §415.001, *Administrative Violation by Representative of Employee or Legal Beneficiary*, Labor Code §415.002, *Administrative Violation by Insurance Carrier*; Labor Code §414.002, *Monitoring Duties*; Labor Code §414.006, *Referral to Other Authorities*; Labor Code §408.203, *Allowable Liens*; and Labor Code §410.167, *Ex Parte Contacts Prohibited*.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

Labor Code §402.021 requires that, in implementing the goals described in the section, the workers' compensation system must minimize the likelihood of disputes and resolve them promptly and fairly when identified, as well as promptly detect and appropriately address acts or practices of noncompliance with the Act and rules. Labor Code §402.021 states a basic goal of the workers' compensation system is that each injured employee must have access to a fair and accessible dispute resolution process. The section further requires the workers' compensation system effectively educate and clearly inform each person who participates in the system as a claimant, employer, insurance carrier, health care provider, or other participant of the person's rights and responsibilities under the system and how to appropriately interact within the system.

Labor Code §408.221 requires an attorney's fee, including a contingency fee, for representing a claimant before the division or court under the Act to be approved by the commissioner or court, to be paid from the claimant's recovery, and to be based on the attorney's time and expenses according to written evidence presented to the division or court. Labor Code §408.221 further requires the commissioner or court to consider a number of factors

when approving an attorney's fee and to provide guidelines for maximum attorney's fees for specific services by rule.

Labor Code §408.222 requires an attorney's fee for defending an insurance carrier in a workers' compensation action brought under the Act to be approved by the division or court and determined by the division or court to be reasonable and necessary. Labor Code §408.222 further requires the division or court consider issues analogous to those listed under §408.221(b) when determining whether a fee is reasonable.

Labor Code §415.021 states that a person commits an administrative violation if they violate, fail to comply with, or refuse to comply with the Act or a rule, order, or decision of the commissioner.

Labor Code §402.00128(b) provides the commissioner with the power to hold hearings and to exercise other powers and perform other duties as necessary to implement and enforce the Act.

Labor Code §415.001 states it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas or a commissioner rule.

Labor Code §415.002 states it is an administrative violation for an insurance carrier or its representative to violate a commissioner rule or fail to comply with a provision of the Act.

Labor Code §414.002 requires the division to monitor for compliance with commissioner rules, the Act, and other laws relating to workers' compensation the conduct of persons subject to this title, including attorneys and other representatives of parties. Labor Code §414.002 further requires the division to monitor the conduct described in Labor Code §415.001 and §415.002 and refer persons engaging in that conduct to the division of hearings.

Labor Code §414.006 authorizes the division to refer persons involved in a case subject to an investigation to other appropriate authorities for further investigation or the institution of appropriate proceedings, including licensing agencies, district and county attorneys, or the attorney general.

Labor Code §408.203 provides that an income or death benefit is subject to liens or claims for an attorney's fee for representing an employee or legal beneficiary in a matter arising under the Act.

Labor Code §410.167 states that a party and a hearing officer may not communicate outside a CCH unless the communication is in writing with copies provided to all parties or relates to a procedural matter.

§152.3. *Approval or Denial of Fee by the Division.*

(a) To claim a fee, an attorney representing any party must submit to the division a complete and accurate application for attorney fees in the form and manner prescribed by the division.

(b) An application for attorney fees must include:

(1) each attorney's name and bar card number;

(2) the law firm name, phone number, and mailing address;

(3) the injured employee's name, date of injury, and DWC claim number;

(4) the beneficiary's name, type, contact information, and social security number, if applicable;

(5) the dates of legal service;

(6) the hourly rate and number of hours for each attorney and legal assistant providing legal services;

(7) an itemized list of each legal service performed and expense incurred representing the claimant or insurance carrier that identifies the attorney or legal assistant who provided the service, the date the service was provided, and the hours or amount requested;

(8) a certification that every statement, numerical figure, and calculation in the application for attorney fees submitted to the division is within the attorney's personal knowledge, is true and correct, and represents services, charges, and expenses provided by the attorney or a legal assistant under the attorney's supervision; and

(9) additional case-specific justification for any fee that exceeds the guidelines for legal services.

(c) The division may approve, partially approve, or deny an application for attorney fees based on the division's determination of whether the requested time and expenses are reasonable according to the guidelines for legal services and maximum hourly rate established in §152.4 of this title, Labor Code §408.221 and §408.222, and written evidence presented to the division. The division will issue an order approving, partially approving, or denying an application for attorney fees. Submission of an application requesting fees for the same services or expenses addressed in any previous application is prohibited. Attorneys are subject to review for compliance with commissioner rules, the Act, and other laws under Labor Code Chapter 414. An order approving, partially approving, or denying an application for attorney fees does not limit the commissioner's authority to enforce a sanction, administrative penalty, or other remedy authorized by the Act. At any time an attorney whose application is found to contain false or inaccurate information may be referred to enforcement or other authorities, including licensing agencies, district and county attorneys, or the attorney general for investigation and appropriate proceedings.

(d) To contest a division order approving, partially approving, or denying an application for attorney fees, an attorney, claimant, or insurance carrier must request a contested case hearing through the dispute resolution process outlined in Chapters 140 - 144 of this title. A request must be submitted by personal delivery, first class mail, or facsimile to the division no later than the 20th day after receipt of the division's order. A claimant may request a hearing by contacting the division in any manner no later than the 20th day after receipt of the division's order. A contesting party other than a claimant must send a copy of the request by personal delivery, first class mail, or electronic transmission to the insurance carrier and the other parties, including the claimant and attorney, on the same day the request is submitted to the division.

(e) After a contested case hearing under subsection (d), an attorney, claimant, or insurance carrier must request review by the appeals panel pursuant to the provisions of §143.3 of this title (Requesting the Appeals Panel To Review the Decision of the Hearing Officer) to contest the division order approving, partially approving, or denying an application for attorney fees.

(f) The division's order approving, partially approving, or denying an application for attorney fees is binding during the pendency of a contest or an appeal of the order. Notice of a contest or an appeal does not relieve the insurance carrier of the obligation to pay attorney fees according to the division order.

(g) Following a contested case hearing or appeals panel review of an order approving, partially approving, or denying an application for attorney fees under subsection (d) or subsection (e), the division will issue a final order or decision. If the final order or decision of the division requires an attorney to reimburse funds, the reimbursement

must be made no later than the 15th day after receipt of the final order or decision.

(h) This section is effective January 30, 2017.

§152.4. Guidelines for Legal Services Provided to Claimants and Insurance Carriers.

(a) The division will consider the guidelines for legal services outlined in subsection (c), the maximum hourly rate for legal services in subsection (d), Labor Code, §408.221 and §408.222, and written evidence presented to the division, when approving, partially approving, or denying an application for attorney fees.

(b) An attorney may request, and the division may approve, a number of hours greater than those allowed by the guidelines for legal services if the attorney demonstrates to the satisfaction of the division that the higher fee was justified based on the circumstances of the specific claim and Labor Code, §408.221 and §408.222.

(c) The guidelines for legal services provided to claimants and insurance carriers are as follows:
Figure: 28 TAC §152.4(c)

(d) The maximum hourly rate for legal services shall be as follows. Hourly rate:

(1) attorney--\$200; and

(2) legal assistant (not to include hours for general office staff)--\$65.

(e) Each attorney must bill for hours using that attorney's state bar card number.

(f) This section is effective January 30, 2017.

§152.6. Attorney Withdrawal.

(a) An attorney withdrawing representation must submit a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (d) and comply with the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, including surrendering papers and property to the client as required.

(b) An attorney must submit a notice of withdrawal in the form and manner prescribed by the division when:

(1) the attorney withdraws representation and a motion to withdraw under subsection (d) is not required; or

(2) the attorney's representation is terminated by the attorney's client.

(c) An attorney must submit a notice of withdrawal under subsection (b) to the division by personal delivery, first class mail, or facsimile no later than the 10th day following withdrawal. An attorney must provide a copy of the notice to the attorney's client and the opposing party by personal delivery, first class mail, or electronic transmission on the same day the notice is submitted to the division. The notice of withdrawal must include:

(1) the attorney's name, bar card number, and contact information;

(2) the law firm name, if applicable;

(3) the injured employee's name, contact information, date of injury, and DWC claim number;

(4) the beneficiary's name, contact information, and social security number, if applicable;

(5) the insurance carrier name;

(6) the effective date of the attorney's withdrawal of representation under paragraph (1) or (2) of subsection (b); and

(7) the attorney's signature.

(d) Except when the attorney's representation is terminated by the attorney's client, an attorney withdrawing representation must submit a motion to withdraw to the division, and receive a division order granting the motion to withdraw, after notice of a scheduled benefit review conference or contested case hearing has been received and until resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A - E.

(e) The motion to withdraw must provide good cause for withdrawing from the case and a certification that states:

(1) the attorney's client has knowledge of and has approved or refused to approve the withdrawal; or

(2) the attorney made a good faith effort to notify the attorney's client and the attorney's client cannot be located.

(f) An attorney must submit the motion to withdraw to the division by personal delivery, first class mail, or facsimile. An attorney must also provide a copy of the motion to the attorney's client and the opposing party by personal delivery, first class mail, or electronic transmission on the same day the motion is submitted to the division.

(g) The hearing officer will determine whether good cause exists for the attorney's withdrawal based on Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct and other factors, including:

(1) how close in time the attorney withdrawal is to a scheduled benefit review conference or contested case hearing;

(2) the amount of attorney fees that have been requested and approved by the division;

(3) whether the attorney is willing to waive payment of any portion of the approved fees;

(4) the attorney's reason for the withdrawal; and

(5) whether the attorney's client refused to approve the withdrawal, if applicable.

(h) If the hearing officer determines good cause does not exist for the attorney's withdrawal, the attorney must continue to represent the party until resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A - E.

(i) This section does not prevent the attorney's client from terminating the attorney-client relationship or notifying the division of the termination of the attorney-client relationship. If the attorney's client notifies the division of a termination, the attorney is not relieved of the duty to submit to the division a notice of withdrawal under subsection (b).

(j) This section is effective January 30, 2017.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 8, 2016.

TRD-201603996

Nicholas Canaday III

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

Earliest possible date of adoption: September 18, 2016

For further information, please call: (512) 804-4703

◆ ◆ ◆

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 11. CONTRACTS

SUBCHAPTER E. CONTRACTS MONITORING ROLES AND RESPONSIBILITIES

30 TAC §11.202

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §11.202, concerning Enhanced Contract Monitoring.

Background and Summary of the Factual Basis for the Proposed Rule

Senate Bill (SB) 20 (84th Texas Legislature, 2015) added Texas Government Code, §2261.253(c), which requires state agencies to establish by rule a procedure to identify each contract that requires enhanced contract or performance monitoring, and submit information to the agencies' governing bodies.

Section Discussion

The commission proposes new §11.202, Enhanced Contract Monitoring, to incorporate this reference now required by statute. The proposed new rule establishes a procedure to ensure that all TCEQ contracts are assessed to determine the level and type of contract monitoring required. The proposed new rule requires the executive director, or his designee, to use risk assessment criteria to identify certain contracts for enhanced contract and performance monitoring. TCEQ's Procurements and Contracts Section, Financial Administration Division, currently maintains internal agency operating procedures for the risk-based assessment of contracts as well as the agency's Contract Management Handbook. The proposed new rule also requires regular reporting to the executive director on contracts identified for enhanced monitoring. The executive director shall notify the commission of serious issues or risks with those contracts.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of the administration or enforcement of the proposed rule.

The proposed rule implements SB 20, which requires state agencies to establish by rule a procedure to identify each contract that requires enhanced or performance monitoring and to submit information related to these contracts to the agencies' governing bodies.

TCEQ's Procurements and Contracts Section, Financial Administration Division, currently maintains internal agency operating procedures for the monitoring of contracts that complies with the

proposed rule. TCEQ has a Contract Management Handbook that outlines standard contract monitoring and identifies when enhanced monitoring is required. Agency Program Areas also maintain more detailed Standard Operating Procedures. No fiscal implications are anticipated for the agency or for any other unit of state or local government as a result of the implementation of the proposed rule.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed new rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and to ensure that agencies have established and consistent procedures for their contracts.

No fiscal implications are anticipated for businesses or individuals as a result of the implementation or administration of the proposed rule. TCEQ's Procurements and Contracts Section within the Financial Administration Division currently maintains internal agency operating procedures for the monitoring of contracts in accordance with the new statute. No changes are anticipated from current agency policies and procedures.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. The proposed rule is not anticipated to result in fiscal implications for any large or small business. The proposed rule is not expected to result in any changes from current agency policies and procedures.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule is required by state law and does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed new rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed new rule is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule." The intent of the proposed rulemaking is to conform to Texas Government Code, §2261.253(c). The changes are not expressly to protect the environment and reduce risks to human health and environment.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed new rule and assessed whether it constitutes a taking under Texas Government Code,

Chapter 2007. The specific purpose of proposed new §11.202 is to conform to Texas Government Code, §2261.253(c). Promulgation and enforcement of this proposed new rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rule-making does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, there are no burdens imposed on private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 13, 2016, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-030-011-AD. The comment period closes on September 19, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact LaTresa Stroud, Procurements and Contracts Section, Financial Administration Division, (512) 239-5555.

Statutory Authority

The new rule is proposed under Texas Water Code (TWC), TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the TWC and any other laws of the State of Texas.

The proposed new rule implements Texas Government Code, §2261.253(c), as added by Senate Bill 20.

§11.202. Enhanced Contract Monitoring.

(a) Pursuant to Texas Government Code, §2261.253, the commission shall assess each contract to determine appropriate contract and performance monitoring requirements.

(b) The executive director or his designee shall ensure that risk assessment factors are used to determine when enhanced contract or performance monitoring is required for a contract. The criteria for evaluating risk include:

- (1) the total contract amount;
- (2) the funding source(s);
- (3) the scope and complexity of the goods or services;
- (4) the risk of fraud, waste, or abuse; and
- (5) the importance of the work to the agency's mission or infrastructure.

(c) Contracts shall be monitored in accordance with the agency's policies and Contract Management Handbook.

(d) The executive director will receive regular reports on contracts identified for enhanced monitoring, and where serious issues or risks are identified, the executive director shall notify the commission.

(e) This section does not apply to a memorandum of understanding, memorandum of agreement, interagency contract, inter-local agreement, intergovernmental contract or contract for which there is not a cost.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2016.

TRD-201603976

David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: September 18, 2016

For further information, please call: (512) 239-2613



CHAPTER 336. RADIOACTIVE SUBSTANCE RULES

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§336.2, 336.315, 336.357, 336.1105, and 336.1113.

Background and Summary of the Factual Basis for the Proposed Rules

The commission proposes changes to Chapter 336, Subchapters A, D, and L that will revise the commission's rules concerning definitions, general requirements for surveys and monitoring, physical protection of category 1 and 2 quantities of radioactive materials, and notification requirements to ensure compatibility with federal regulations promulgated by the Nuclear Regulatory Commission (NRC) which is necessary to preserve the status of Texas as an Agreement State under Title 10 Code of Federal Regulations (CFR) Part 150 and under the "Articles of Agreement between the United States Atomic Energy Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as

Amended." Rules which are designated by NRC as compatibility items must be adopted by an Agreement State within three years of the effective date of the NRC rules, in most cases.

Section by Section Discussion

The commission proposes administrative changes throughout this rulemaking to be consistent with *Texas Register* requirements and agency rules and guidelines.

§336.2, Definitions

The commission proposes to amend §336.2 by updating the definitions of "Agreement state" and "Category 2 quantity of radioactive material." The amendment to §336.2(7) would clarify the definition of "Agreement state" by adding that a Non-agreement State means any other state. The amendment to §336.2(24) would clarify the definition of "Category 2 quantity of radioactive material" by adding that any fuel assembly, subassembly, fuel rod, or fuel pellet are not included in this definition.

§336.315, General Requirements for Surveys and Monitoring

The commission proposes to amend §336.315 to clarify the general requirements for surveys and monitoring.

The commission proposes to amend §336.315(a)(2)(C) to clarify that potential radiological hazards are radiation levels and residual radioactivity that have been detected.

The commission proposes to add §336.315(e) to require that records from surveys describing the location and amount of subsurface residual radioactivity identified at the site are to be stored at the same location and with the same retention schedule as records important to decommissioning.

§336.357, Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material

The commission proposes to amend the requirements regarding physical protection of category 1 and 2 quantities of radioactive materials in §336.357.

The commission proposes to amend §336.357(c)(2)(B) to update a cross-reference.

The commission proposes to amend §336.357(e)(3)(A) and (B) to update NRC contact information.

The commission proposes to amend §336.357(g)(4) to replace "NRC" with "commission."

The commission proposes to amend §336.357(i)(1)(C) to replace "NRC" with "commission."

The commission proposes to amend §336.357(j) to replace "NRC" with "commission" and to change the point of contact from the federal to the state level for all applicable subsections within this subsection.

The commission proposes to amend §336.357(q)(1) and (2) to update relevant NRC contact information. Additionally, the commission proposes to amend subsection (q)(3) to replace "NRC" with "commission."

The commission proposes to amend §336.357(u) throughout the subsection to replace "NRC" with "commission" and update relevant NRC contact information. Additionally, the commission proposes to add §336.357(u)(6) that will require that state officials, state employees, and other individuals who receive schedule information on the transport of category 1 or 2 quantities of radioactive material must protect this information against unauthorized disclosure.

The commission proposes to amend §336.357(w) throughout the subsection to update reporting notification requirements and contact information.

§336.1105, Definitions

The commission proposes to amend §336.1105(10) to clarify the definition of "Commencement of construction" versus construction. Additionally, the commission proposes to add the definition for "Construction" at §336.1105(12), which adds additional information on what activities are not included in the definition of construction. The commission also proposes to amend existing §336.1105(35) to update the definition of "Unrefined and unprocessed ore" to clarify that processing does not include sieving or encapsulation of ore or preparation of samples for laboratory analysis.

§336.1113, Specific Terms and Conditions of Licenses

The commission proposes to amend §336.1113(2)(A) to add the requirement that the licensee must notify TCEQ for any unusual conditions in the by-product material retention system that could result in a release of by-product material into unrestricted areas.

Fiscal Note: Costs to State and Local Government

Maribel Montalvo, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules would revise the commission's rules concerning definitions, general requirements for surveys and monitoring, and physical protection of category 1 and 2 quantities of radioactive materials. This proposed rulemaking is required to ensure compatibility with federal regulations promulgated by the NRC. Compatibility with federal regulations is necessary to preserve the status of Texas as an Agreement State under 10 CFR Part 150 and under the "Articles of Agreement between the United States Atomic Energy Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended." Rules designated by NRC as compatibility items must be adopted by an Agreement State within three years of the effective date of the NRC rules, in most cases.

This rulemaking would not adopt any fees and does not change any standards or procedures currently in place. There are no costs expected for the agency or any other unit of state or local government to implement or administer the proposed rules.

Public Benefits and Costs

Ms. Montalvo also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be an improvement in the rules that ensure that radioactive material is used, stored, and transported safely. No fiscal implications are anticipated for businesses or individuals due to implementation or administration of the proposed rules.

Small Business and Micro-Business Assessment

No significant fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect. However, five TCEQ licensees which are small businesses would potentially be affected by the proposed

rules. One micro-business would be affected by the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect. This rulemaking is required. In order to maintain its status as an Agreement State under 10 CFR Part 150, Texas must comply with federal rules.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission proposes the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposal to Chapter 336 is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because these revisions are required for the commission to maintain compatibility with the NRC for these licensing programs. Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

Texas Health and Safety Code (THSC), Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, Texas is an "Agreement State" authorized by the NRC to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules are compatible with federal law.

The proposed rules do not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements, including requirements for public notices, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The proposed rules are compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as amended, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State." This rulemaking is proposed under the specific authority of THSC, Chapter 401. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rulemaking and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that the Private Real Property Rights Preservation Act does not apply to this proposed rulemaking because these rules implement Senate Bill (SB) 1604, 80th Texas Legislature, 2007, transferring certain regulatory responsibilities from Texas Department of State Health Services to the commission and is an action reasonably taken to fulfill an obligation mandated by federal law. Nevertheless, the commission further evaluated this proposed rulemaking and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 6, 2016, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-035-336-WS. The comment period closes on September 19, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Hans Weger, Radioactive Materials Unit, (512) 239-6465.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §336.2

Statutory Authority

The amendment is proposed under the Texas Radiation Control Act (TRCA), Texas Health and Safety Code (THSC), Chapter 401; THSC, §401.011, which provides the commission the authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, and the recovery and processing of source material; THSC, §401.051, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; THSC, §401.103, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; THSC, §401.104, which requires the commission to provide rules for licensing for the disposal of radioactive substances; and THSC, §401.106, which authorizes the commission to adopt rules to exempt a source of radiation from the licensing requirements provided by the TRCA. The amendment is also proposed as authorized by Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements THSC, Chapter 401, and is proposed to meet compatibility standards set by the United States Nuclear Regulatory Commission.

§336.2. *Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings, or as described in Chapter 3 of this title (relating to Definitions), unless the context clearly indicates otherwise. Additional definitions used only in a certain subchapter will be found in that subchapter.

(1) Absorbed dose--The energy imparted by ionizing radiation per unit mass of irradiated material. The units of absorbed dose are the rad and the gray (Gy).

(2) Accelerator-produced radioactive material--Any material made radioactive by a particle accelerator.

(3) Access control--A system for allowing only approved individuals to have unescorted access to the security zone and for ensuring that all other individuals are subject to escorted access.

(4) Activity--The rate of disintegration (transformation) or decay of radioactive material. The units of activity are the curie (Ci) and the becquerel (Bq).

(5) Adult--An individual 18 or more years of age.

(6) Aggregated--Accessible by the breach of a single physical barrier that allows access to radioactive material in any form, including any devices containing the radioactive material, when the total activity equals or exceeds a category 2 quantity of radioactive material.

(7) Agreement state--Any state with which the United States Nuclear Regulatory Commission (NRC) or the Atomic Energy Commission has entered into an effective agreement under the Atomic Energy Act of 1954, §274b, as amended. Non-agreement State means any other State. [through October 24, 1992 (Public Law 102-486).]

(8) Airborne radioactive material--Any radioactive material dispersed in the air in the form of dusts, fumes, particulates, mists, vapors, or gases.

(9) Airborne radioactivity area--A room, enclosure, or area in which airborne radioactive materials, composed wholly or partly of licensed material, exist in concentrations:

(A) in excess of the derived air concentrations (DACs) specified in Table I of §336.359(d) of this title (relating to Appendix B. Annual Limits on Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage); or

(B) to a degree that an individual present in the area without respiratory protective equipment could exceed, during the hours an individual is present in a week, an intake of 0.6% of the ALI or 12 DAC-hours.

(10) Air-purifying respirator--A respirator with an air-purifying filter, cartridge, or canister that removes specific air contaminants by passing ambient air through the air-purifying element.

(11) Annual limit on intake (ALI)--The derived limit for the amount of radioactive material taken into the body of an adult worker by inhalation or ingestion in a year. ALI is the smaller value of intake of a given radionuclide in a year by the "reference man" that would result in a committed effective dose equivalent of 5 rems (0.05 sievert) or a committed dose equivalent of 50 rems (0.5 sievert) to any individual organ or tissue. ALI values for intake by ingestion and by inhalation of selected radionuclides are given in Table I, Columns 1 and 2 of §336.359(d) of this title (relating to Appendix B. Annual Limits on Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage).

(12) Approved individual--An individual whom the licensee has determined to be trustworthy and reliable for unescorted access in accordance with §336.357(b) - (h) of this title (relating to Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material) and who has completed the training required by §336.357(j)(3) of this title.

(13) As low as is reasonably achievable--Making every reasonable effort to maintain exposures to radiation as far below the dose limits in this chapter as is practical, consistent with the purpose for which the licensed activity is undertaken, taking into account the state of technology, the economics of improvements in relation to the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of ionizing radiation and licensed radioactive materials in the public interest.

(14) Assigned protection factor (APF)--The expected workplace level of respiratory protection that would be provided by a properly functioning respirator or a class of respirators to properly fitted and trained users. Operationally, the inhaled concentration can be estimated by dividing the ambient airborne concentration by the APF.

(15) Atmosphere-supplying respirator--A respirator that supplies the respirator user with breathing air from a source independent of the ambient atmosphere, and includes supplied-air respirators and self-contained breathing apparatus units.

(16) Background investigation--The investigation conducted by a licensee or applicant to support the determination of trustworthiness and reliability.

(17) Background radiation--Radiation from cosmic sources; non-technologically enhanced naturally-occurring radioactive material, including radon (except as a decay product of source or special nuclear material) and global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents such as Chernobyl that contribute to background radiation and are not under the control of the licensee. "Background radiation" does not include radiation from radioactive materials regulated by the commission, Texas Department of State Health Services, United States Nuclear Regulatory Commission [NRC], or an Agreement State.

(18) Becquerel (Bq)--See §336.4 of this title (relating to Units of Radioactivity).

(19) Bioassay--The determination of kinds, quantities, or concentrations, and, in some cases, the locations of radioactive material in the human body, whether by direct measurement (in vivo counting) or by analysis and evaluation of materials excreted or removed from the human body. For purposes of the rules in this chapter, "radiobioassay" is an equivalent term.

(20) Byproduct material--

(A) a [A] radioactive material, other than special nuclear material, that is produced in or made radioactive by exposure to radiation incident to the process of producing or using special nuclear material;

(B) the [The] tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes, and other tailings having similar radiological characteristics. Underground ore bodies depleted by these solution extraction processes do not constitute "byproduct material" within this definition;

(C) any [Any] discrete source of radium-226 that is produced, extracted, or converted after extraction, for use for a commercial, medical, or research activity;

(D) any [Any] material that has been made radioactive by use of a particle accelerator, and is produced, extracted, or converted for use for a commercial, medical, or research activity; and

(E) any [Any] discrete source of naturally occurring radioactive material, other than source material, that is extracted or converted after extraction for use in a commercial, medical, or research activity and that the United States Nuclear Regulatory Commission [NRC], in consultation with the Administrator of the United States Environmental Protection Agency, the United States Secretary of Energy, the United States Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source of radium-226 to the public health and safety or the common defense and security.

(21) CFR--Code of Federal Regulations.

(22) Carrier--A person engaged in the transportation of passengers or property by land or water as a common, contract, or private carrier, or by civil aircraft.

(23) Category 1 quantity of radioactive material--A quantity of radioactive material meeting or exceeding the category 1 threshold in accordance with §336.357(z) of this title (relating to Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material). This is determined by calculating the ratio of the total activity of each radionuclide to the category 1 threshold for that radionuclide and adding the ratios together. If the sum is equal to or exceeds 1, the quantity would be considered a category 1 quantity. Category 1 quantities of radioactive material do not include the radioactive material contained in any fuel assembly, subassembly, fuel rod, or fuel pellet.

(24) Category 2 quantity of radioactive material--A quantity of radioactive material meeting or exceeding the category 2 threshold but less than the category 1 threshold in accordance with §336.357(z) of this title (relating to Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material). This is determined by calculating the ratio of the total activity of each radionuclide to the category 2 threshold for that radionuclide and adding the ratios together. If the sum is equal to or exceeds 1, the quantity would be considered a category 2. Category 2 quantities of radioactive material do not include the radioactive material contained in any fuel assembly, subassembly, fuel rod, or fuel pellet.

(25) Class--A classification scheme for inhaled material according to its rate of clearance from the pulmonary region of the lung. Materials are classified as D, W, or Y, which applies to a range of clearance half-times: for Class D (Days) of less than ten days, for Class W (Weeks) from 10 to 100 days, and for Class Y (Years) of greater than 100 days. For purposes of the rules in this chapter, "lung class" and "inhalation class" are equivalent terms.

(26) Collective dose--The sum of the individual doses received in a given period of time by a specified population from exposure to a specified source of radiation.

(27) Committed dose equivalent ($H_{T,50}$) (CDE)--The dose equivalent to organs or tissues of reference (T) that will be received from an intake of radioactive material by an individual during the 50-year period following the intake.

(28) Committed effective dose equivalent ($H_{E,50}$) (CEDE)--The sum of the products of the weighting factors applicable to each of the body organs or tissues that are irradiated and the committed dose equivalent to each of these organs or tissues.

(29) Compact--The Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, §403.006 and Texas Low-Level Radioactive Waste Disposal Compact Consent Act, Public Law Number 105-236 (1998).

(30) Compact waste--Low-level radioactive waste that:

(A) is generated in a host state or a party state; or

(B) is not generated in a host state or a party state, but has been approved for importation to this state by the compact commission under §3.05 of the compact established under Texas Health and Safety Code, §403.006.

(31) Compact waste disposal facility--The low-level radioactive waste land disposal facility licensed by the commission under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) for the disposal of compact waste.

(32) Constraint (dose constraint)--A value above which specified licensee actions are required.

(33) Critical group--The group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.

(34) Curie (Ci)--See §336.4 of this title (relating to Units of Radioactivity).

(35) Declared pregnant woman--A woman who has voluntarily informed the licensee, in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman withdraws the declaration in writing or is no longer pregnant.

(36) Decommission--To remove (as a facility) safely from service and reduce residual radioactivity to a level that permits:

(A) release of the property for unrestricted use and termination of license; or

(B) release of the property under restricted conditions and termination of the license.

(37) Deep-dose equivalent (H_d) (which applies to external whole-body exposure)--The dose equivalent at a tissue depth of one centimeter (1,000 milligrams/square centimeter).

(38) Demand respirator--An atmosphere-supplying respirator that admits breathing air to the facepiece only when a negative pressure is created inside the facepiece by inhalation.

(39) Depleted uranium--The source material uranium in which the isotope uranium-235 is less than 0.711%, by weight, of the total uranium present. Depleted uranium does not include special nuclear material.

(40) Derived air concentration (DAC)--The concentration of a given radionuclide in air which, if breathed by the "reference man" for a working year of 2,000 hours under conditions of light work (inhalation rate of 1.2 cubic meters of air/hour), results in an intake of one ALI. DAC values are given in Table I, Column 3, of §336.359(d) of this title (relating to Appendix B. Annual Limits on Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage).

(41) Derived air concentration-hour (DAC-hour)--The product of the concentration of radioactive material in air (expressed as a fraction or multiple of the derived air concentration for each radionuclide) and the time of exposure to that radionuclide, in hours.

A licensee shall take 2,000 DAC-hours to represent one, equivalent to a committed effective dose equivalent of 5 rems (0.05 sievert).

(42) Discrete source--A radionuclide that has been processed so that its concentration within a material has been purposely increased for use for commercial, medical, or research activities.

(43) Disposal--With regard to low-level radioactive waste, the isolation or removal of low-level radioactive waste from mankind and mankind's environment without intent to retrieve that low-level radioactive waste later.

(44) Disposable respirator--A respirator for which maintenance is not intended and that is designed to be discarded after excessive breathing resistance, sorbent exhaustion, physical damage, or end-of-service-life renders it unsuitable for use. Examples of this type of respirator are a disposable half-mask respirator or a disposable escape-only Self-Contained breathing apparatus [SCBA].

(45) Distinguishable from background--The detectable concentration of a radionuclide is statistically different from the background concentration of that radionuclide in the vicinity of the site or, in the case of structures, in similar materials using adequate measurement technology, survey, and statistical techniques.

(46) Diversion--The unauthorized movement of radioactive material subject to §336.357 of this title (relating to Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material) to a location different from the material's authorized destination inside or outside of the site at which the material is used or stored.

(47) Dose--A generic term that means absorbed dose, dose equivalent, effective dose equivalent, committed dose equivalent, committed effective dose equivalent, total organ dose equivalent, or total effective dose equivalent. For purposes of the rules in this chapter, "radiation dose" is an equivalent term.

(48) Dose equivalent (H_e)--The product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of dose equivalent are the rem and sievert (S).

(49) Dose limits--The permissible upper bounds of radiation doses established in accordance with the rules in this chapter. For purposes of the rules in this chapter, "limits" is an equivalent term.

(50) Dosimetry processor--An individual or organization that processes and evaluates individual monitoring devices in order to determine the radiation dose delivered to the monitoring devices.

(51) Effective dose equivalent (H_e)--The sum of the products of the dose equivalent to each organ or tissue (H_t) and the weighting factor (w_t) applicable to each of the body organs or tissues that are irradiated.

(52) Embryo/fetus--The developing human organism from conception until the time of birth.

(53) Entrance or access point--Any opening through which an individual or extremity of an individual could gain access to radiation areas or to licensed radioactive materials. This includes portals of sufficient size to permit human access, irrespective of their intended use.

(54) Environmental Radiation and Perpetual Care Account--An account in the general revenue fund established for the purposes specified in the Texas Health and Safety Code, §401.306.

(55) Escorted access--Accompaniment while in a security zone by an approved individual who maintains continuous direct visual

surveillance at all times over an individual who is not approved for unescorted access.

(56) Exposure--Being exposed to ionizing radiation or to radioactive material.

(57) Exposure rate--The exposure per unit of time.

(58) External dose--That portion of the dose equivalent received from any source of radiation outside the body.

(59) Extremity--Hand, elbow, arm below the elbow, foot, knee, and leg below the knee. The arm above the elbow and the leg above the knee are considered part of the whole body.

(60) Federal facility waste--Low-level radioactive waste that is the responsibility of the federal government under the Low-Level Radioactive Waste Policy Act, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 United States Code, §2021b - 2021j). Excluded from this definition is low-level radioactive waste that is classified as greater than Class C in §336.362 of this title (relating to Appendix E. Classification and Characteristics of Low-Level Radioactive Waste).

(61) Federal facility waste disposal facility--A low-level radioactive waste land disposal facility for the disposal of federal facility waste licensed under Subchapters H and J of this chapter (relating to Licensing Requirements for [Requirement of] Near-Surface Land Disposal of Low-Level Radioactive Waste, and Federal Facility Waste Disposal Facility).

(62) Filtering facepiece (dust mask)--A negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium, not equipped with elastomeric sealing surfaces and adjustable straps.

(63) Fingerprint Orders--Orders issued by the Nuclear Regulatory Commission or the legally binding requirements issued by Agreement States that require fingerprints and criminal history records checks for individuals with unescorted access to category 1 and category 2 quantities of radioactive material or safeguards information-modified handling.

(64) Fit factor--A quantitative estimate of the fit of a particular respirator to a specific individual, and typically estimates the ratio of the concentration of a substance in ambient air to its concentration inside the respirator when worn.

(65) Fit test--The use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual.

(66) General license--An authorization granted by an agency under its rules which is effective without the filing of an application with that agency or the issuance of a licensing document to the particular person.

(67) Generally applicable environmental radiation standards--Standards issued by the EPA under the authority of the Atomic Energy Act of 1954, as amended through October 4, 1996, that impose limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material.

(68) Gray (Gy)--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(69) Hazardous waste--Hazardous waste as defined in §335.1 of this title (relating to Definitions).

(70) Helmet--A rigid respiratory inlet covering that also provides head protection against impact and penetration.

(71) High radiation area--An area, accessible to individuals, in which radiation levels from radiation sources external to the body could result in an individual receiving a dose equivalent in excess of 0.1 rem (1 millisievert) in one hour at 30 centimeters from the radiation source or 30 centimeters from any surface that the radiation penetrates.

(72) Hood--A respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.

(73) Host state--A party state in which a compact facility is located or is being developed. The state of Texas is the host state under the Texas Low-Level Radioactive Waste Disposal Compact, §2.01, established under Texas Health and Safety Code, §403.006.

(74) Individual--Any human being.

(75) Individual monitoring--The assessment of:

(A) dose equivalent by the use of individual monitoring devices;

(B) committed effective dose equivalent by bioassay or by determination of the time-weighted air concentrations to which an individual has been exposed, that is, derived air concentration-hour; or

(C) dose equivalent by the use of survey data.

(76) Individual monitoring devices--Devices designed to be worn by a single individual for the assessment of dose equivalent such as film badges, thermoluminescence dosimeters, pocket ionization chambers, and personal ("lapel") air sampling devices.

(77) Inhalation class--See "Class."

(78) Inspection--An official examination and/or observation including, but not limited to, records, tests, surveys, and monitoring to determine compliance with the Texas Radiation Control Act and rules, orders, and license conditions of the commission.

(79) Internal dose--That portion of the dose equivalent received from radioactive material taken into the body.

(80) Land disposal facility--The land, buildings and structures, and equipment which are intended to be used for the disposal of low-level radioactive wastes into the subsurface of the land. For purposes of this chapter, a "geologic repository" as defined in 10 Code of Federal Regulations §60.2 as amended through October 27, 1988 (53 FR 43421) (relating to Definitions - high-level radioactive wastes in geologic repositories) is not considered a "land disposal facility."

(81) Lens dose equivalent (LDE)--The external exposure of the lens of the eye and is taken as the dose equivalent at a tissue depth of 0.3 centimeter (300 mg/cm²).

(82) License--See "Specific license."

(83) Licensed material--Radioactive material received, possessed, used, processed, transferred, or disposed of under a license issued by the commission.

(84) Licensee--Any person who holds a license issued by the commission in accordance with the Texas Health and Safety Code, Chapter 401 (Radioactive Materials and Other Sources of Radiation) and the rules in this chapter. For purposes of the rules in this chapter, "radioactive material licensee" is an equivalent term. Unless stated otherwise, "licensee" as used in the rules of this chapter means the holder of a "specific license."

(85) Licensing state--Any state with rules equivalent to the Suggested State Regulations for Control of Radiation relating to, and having an effective program for, the regulatory control of naturally

occurring or accelerator-produced radioactive material (NARM) and which has been designated as such by the Conference of Radiation Control Program Directors, Inc.

(86) Local law enforcement agency (LLEA)--A public or private organization that has been approved by a federal, state, or local government to carry firearms; make arrests; and is authorized and has the capability to provide an armed response in the jurisdiction where the licensed category 1 or category 2 quantity of radioactive material is used, stored, or transported.

(87) Loose-fitting facepiece--A respiratory inlet covering that is designed to form a partial seal with the face.

(88) Lost or missing licensed radioactive material--Licensed material whose location is unknown. This definition includes material that has been shipped but has not reached its planned destination and whose location cannot be readily traced in the transportation system.

(89) Low-level radioactive waste--

(A) Except as provided by subparagraph (B) of this paragraph, low-level radioactive waste means radioactive material that:

(i) is discarded or unwanted and is not exempt by a Texas Department of State Health Services rule adopted under the Texas Health and Safety Code, §401.106;

(ii) is waste, as that term is defined by 10 Code of Federal Regulations (CFR) §61.2; and

(iii) is subject to:

(I) concentration limits established under this chapter; and

(II) disposal criteria established under this chapter.

(B) Low-level radioactive waste does not include:

(i) high-level radioactive waste defined by 10 CFR §60.2;

(ii) spent nuclear fuel as defined by 10 CFR §72.3;

(iii) transuranic waste as defined in this section;

(iv) byproduct material as defined by paragraph (20)(B) - (E) of this section;

(v) naturally occurring radioactive material (NORM) waste; or

(vi) oil and gas NORM waste.

(C) When used in this section, the references to 10 CFR sections mean those CFR sections as they existed on September 1, 1999, as required by Texas Health and Safety Code, §401.005.

(90) Lung class--See "Class."

(91) Member of the public--Any individual except when that individual is receiving an occupational dose.

(92) Minor--An individual less than 18 years of age.

(93) Mixed waste--A combination of hazardous waste, as defined in §335.1 of this title (relating to Definitions) and low-level radioactive waste. The term includes compact waste and federal facility waste containing hazardous waste.

(94) Mobile device--A piece of equipment containing licensed radioactive material that is either mounted on wheels or cast-

ers, or otherwise equipped for moving without a need for disassembly or dismounting; or designed to be hand carried. Mobile devices do not include stationary equipment installed in a fixed location.

(95) Monitoring--The measurement of radiation levels, radioactive material concentrations, surface area activities, or quantities of radioactive material and the use of the results of these measurements to evaluate potential exposures and doses. For purposes of the rules in this chapter, "radiation monitoring" and "radiation protection monitoring" are equivalent terms.

(96) Movement control center--An operations center that is remote from transport activity and that maintains position information on the movement of radioactive material, receives reports of attempted attacks or thefts, provides a means for reporting these and other problems to appropriate agencies and can request and coordinate appropriate aid.

(97) Nationally tracked source--A sealed source containing a quantity equal to or greater than category 1 or category levels of any radioactive material listed in §336.351 of this title (relating to Reports of Transactions Involving Nationally Tracked Sources). In this context a sealed source is defined as radioactive material that is sealed in a capsule or closely bonded, in a solid form and which is not exempt from regulatory control. It does not mean material encapsulated solely for disposal, or nuclear material contained in any fuel assembly, subassembly, fuel rod, or fuel pellet. Category 1 nationally tracked sources are those containing radioactive material at a quantity equal to or greater than the category 1 threshold. Category 2 nationally tracked sources are those containing radioactive material at a quantity equal to or greater than the category 2 threshold but less than the category 1 threshold.

(98) Naturally occurring or accelerator-produced radioactive material (NARM)--Any NARM except source material or special nuclear material.

(99) Naturally occurring radioactive material (NORM) waste--Solid, liquid, or gaseous material or combination of materials, excluding source material, special nuclear material, and byproduct material, that:

- (A) in its natural physical state spontaneously emits radiation;
- (B) is discarded or unwanted; and
- (C) is not exempt under rules of the Texas Department of State Health Services adopted under Texas Health and Safety Code, §401.106.

(100) Near-surface disposal facility--A land disposal facility in which low-level radioactive waste is disposed of in or within the upper 30 meters of the earth's surface.

(101) Negative pressure respirator (tight fitting)--A respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside the respirator.

(102) No-later-than arrival time--The date and time that the shipping licensee and receiving licensee have established as the time an investigation will be initiated if the shipment has not arrived at the receiving facility. The no-later-than arrival time may not be more than six hours after the estimated arrival time for shipments of category 2 quantities of radioactive material.

(103) Nonstochastic effect--A health effect, the severity of which varies with the dose and for which a threshold is believed to exist. Radiation-induced cataract formation is an example of a nonstochastic

effect. For purposes of the rules in this chapter, "deterministic effect" is an equivalent term.

(104) Occupational dose--The dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to radiation and/or to radioactive material from licensed and unlicensed sources of radiation, whether in the possession of the licensee or other person. Occupational dose does not include dose received from background radiation, as a patient from medical practices, from voluntary participation in medical research programs, or as a member of the public.

(105) Oil and gas naturally occurring radioactive material (NORM) waste--NORM waste that constitutes, is contained in, or has contaminated oil and gas waste as that term is defined in the Texas Natural Resources Code, §91.1011.

(106) On-site--The same or geographically contiguous property that may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way that the property owner controls and to which the public does not have access, is also considered on-site property.

(107) Particle accelerator--Any machine capable of accelerating electrons, protons, deuterons, or other charged particles in a vacuum and discharging the resultant particulate or other associated radiation at energies usually in excess of 1 million electron volts (MeV).

(108) Party state--Any state that has become a party to the compact in accordance with Article VII of the Texas Low-Level Radioactive Waste Disposal Compact, established under Texas Health and Safety Code, §403.006.

(109) Perpetual care account--The Environmental Radiation and Perpetual Care Account as defined in this section.

(110) Personnel monitoring equipment--See "Individual monitoring devices."

(111) Planned special exposure--An infrequent exposure to radiation, separate from and in addition to the annual occupational dose limits.

(112) Positive pressure respirator--A respirator in which the pressure inside the respiratory inlet covering exceeds the ambient air pressure outside the respirator.

(113) Powered air-purifying respirator (PAPR)--An air-purifying respirator that uses a blower to force the ambient air through air-purifying elements to the inlet covering.

(114) Pressure demand respirator--A positive pressure atmosphere-supplying respirator that admits breathing air to the facepiece when the positive pressure is reduced inside the facepiece by inhalation.

(115) Principal activities--Activities authorized by the license which are essential to achieving the purpose(s) for which the license is issued or amended. Storage during which no licensed material is accessed for use or disposal and activities incidental to decontamination or decommissioning are not principal activities.

(116) Public dose--The dose received by a member of the public from exposure to radiation and/or radioactive material released by a licensee, or to any other source of radiation under the control of the licensee. It does not include occupational dose or doses received from background radiation, as a patient from medical practices, or from voluntary participation in medical research programs.

(117) Qualitative fit test (QLFT)--A pass/fail test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.

(118) Quality factor (Q)--The modifying factor listed in Table I or II of §336.3(c) or (d) of this title (relating to Units of Radiation Exposure and Dose) that is used to derive dose equivalent from absorbed dose.

(119) Quantitative fit test (QNFT)--An assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.

(120) Quarter (Calendar quarter)--A period of time equal to one-fourth of the year observed by the licensee (approximately 13 consecutive weeks), providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(121) Rad--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(122) Radiation--Alpha particles, beta particles, gamma rays, x-rays, neutrons, high-speed electrons, high-speed protons, and other particles capable of producing ions. For purposes of the rules in this chapter, "ionizing radiation" is an equivalent term. Radiation, as used in this chapter, does not include non-ionizing radiation, such as radio- or microwaves or visible, infrared, or ultraviolet light.

(123) Radiation area--Any area, accessible to individuals, in which radiation levels could result in an individual receiving a dose equivalent in excess of 0.005 rem (0.05 millisievert) in one hour at 30 centimeters from the source of radiation or from any surface that the radiation penetrates.

(124) Radiation machine--Any device capable of producing ionizing radiation except those devices with radioactive material as the only source of radiation.

(125) Radioactive material--A naturally-occurring or artificially-produced solid, liquid, or gas that emits radiation spontaneously.

(126) Radioactive substance--Includes byproduct material, radioactive material, low-level radioactive waste, source material, special nuclear material, source of radiation, and naturally occurring radioactive material (NORM) NORM waste, excluding oil and gas NORM waste.

(127) Radioactivity--The disintegration of unstable atomic nuclei with the emission of radiation.

(128) Radiobioassay--See "Bioassay."

(129) Reference man--A hypothetical aggregation of human physical and physiological characteristics determined by international consensus. These characteristics shall be used by researchers and public health workers to standardize results of experiments and to relate biological insult to a common base. A description of "reference man" is contained in the International Commission on Radiological Protection (ICRP) report, ICRP Publication 23, "Report of the Task Group on Reference Man."

(130) Rem--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(131) Residual radioactivity--Radioactivity in structures, materials, soils, groundwater, and other media at a site resulting from activities under the licensee's control. This includes radioactivity from all licensed and unlicensed sources used by the licensee, but excludes background radiation. It also includes radioactive materials remaining

at the site as a result of routine or accidental releases of radioactive material at the site and previous burials at the site, even if those burials were made in accordance with the provisions of 10 Code of Federal Regulations Part 20.

(132) Respiratory protection equipment--An apparatus, such as a respirator, used to reduce an individual's intake of airborne radioactive materials. For purposes of the rules in this chapter, "respiratory protective device" is an equivalent term.

(133) Restricted area--An area, access to which is limited by the licensee for the purpose of protecting individuals against undue risks from exposure to radiation and radioactive materials. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building shall be set apart as a restricted area.

(134) Reviewing official--The individual who shall make the trustworthiness and reliability determination of an individual to determine whether the individual may have, or continue to have, unescorted access to the category 1 or category 2 quantities of radioactive materials that are possessed by the licensee.

(135) Roentgen (R)--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(136) Sabotage--Deliberate damage, with malevolent intent, to a category 1 or category 2 quantity of radioactive material, a device that contains a category 1 or category 2 quantity of radioactive material, or the components of the security system.

(137) Safe haven--A readily recognizable and readily accessible site at which security is present or from which, in the event of an emergency, the transport crew can notify and wait for the local law enforcement authorities.

(138) Sanitary sewerage--A system of public sewers for carrying off waste water and refuse, but excluding sewage treatment facilities, septic tanks, and leach fields owned or operated by the licensee.

(139) Sealed source--Radioactive material that is permanently bonded or fixed in a capsule or matrix designed to prevent release and dispersal of the radioactive material under the most severe conditions that are likely to be encountered in normal use and handling.

(140) Security zone--Any temporary or permanent area established by the licensee for the physical protection of category 1 or category 2 quantities of radioactive material.

(141) Self-contained breathing apparatus (SCBA)--An atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

(142) Shallow-dose equivalent (H) (which applies to the external exposure of the skin of the whole body or the skin of an extremity)--The dose equivalent at a tissue depth of 0.007 centimeter (seven milligrams/square centimeter).

(143) SI--The abbreviation for the International System of Units.

(144) Sievert (S)--See §336.3 of this title (relating to Units of Radiation Exposure and Dose).

(145) Site boundary--That line beyond which the land or property is not owned, leased, or otherwise controlled by the licensee.

(146) Source material--

(A) uranium [Uranium] or thorium, or any combination thereof, in any physical or chemical form; or

(B) ores [Ores] that contain, by weight, 0.05% or more of uranium, thorium, or any combination thereof. Source material does not include special nuclear material.

(147) Special form radioactive material--Radioactive material which is either a single solid piece or is contained in a sealed capsule that can be opened only by destroying the capsule and which has at least one dimension not less than five millimeters and which satisfies the test requirements of 10 Code of Federal Regulations §71.75 as amended through September 28, 1995 (60 FR 50264) (Transportation of License Material).

(148) Special nuclear material--

(A) plutonium [Plutonium], uranium-233, uranium enriched in the isotope 233 or in the isotope 235, and any other material that the National Regulatory Commission, under the provisions of the Atomic Energy Act of 1954, §51, as amended through November 2, 1994 (Public Law 103-437), determines to be special nuclear material, but does not include source material; or

(B) any material artificially enriched by any of the foregoing, but does not include source material.

(149) Special nuclear material in quantities not sufficient to form a critical mass--Uranium enriched in the isotope 235 in quantities not exceeding 350 grams of contained uranium-235; uranium-233 in quantities not exceeding 200 grams; plutonium in quantities not exceeding 200 grams; or any combination of these in accordance with the following formula: For each kind of special nuclear material, determine the ratio between the quantity of that special nuclear material and the quantity specified in this paragraph for the same kind of special nuclear material. The sum of such ratios for all of the kinds of special nuclear material in combination shall not exceed 1. For example, the following quantities in combination would not exceed the limitation: (175 grams contained U-235/350 grams) + (50 grams U-233/200 grams) + (50 grams Pu/200 grams) = 1.

(150) Specific license--A licensing document issued by an agency upon an application filed under its rules. For purposes of the rules in this chapter, "radioactive material license" is an equivalent term. Unless stated otherwise, "license" as used in this chapter means a "specific license."

(151) State--The state of Texas.

(152) Stochastic effect--A health effect that occurs randomly and for which the probability of the effect occurring, rather than its severity, is assumed to be a linear function of dose without threshold. Hereditary effects and cancer incidence are examples of stochastic effects. For purposes of the rules in this chapter, "probabilistic effect" is an equivalent term.

(153) Supplied-air respirator (SAR) or airline respirator--An atmosphere-supplying respirator for which the source of breathing air is not designed to be carried by the user.

(154) Survey--An evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, release, disposal, and/or presence of radioactive materials or other sources of radiation. When appropriate, this evaluation includes, but is not limited to, physical examination of the location of radioactive material and measurements or calculations of levels of radiation or concentrations or quantities of radioactive material present.

(155) Telemetric position monitoring system--A data transfer system that captures information from instrumentation and/or measuring devices about the location and status of a transport vehicle or package between the departure and destination locations.

(156) Termination--As applied to a license, a release by the commission of the obligations and authorizations of the licensee under the terms of the license. It does not relieve a person of duties and responsibilities imposed by law.

(157) Tight-fitting facepiece--A respiratory inlet covering that forms a complete seal with the face.

(158) Total effective dose equivalent (TEDE)--The sum of the effective dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures).

(159) Total organ dose equivalent (TODE)--The sum of the deep-dose equivalent and the committed dose equivalent to the organ receiving the highest dose as described in §336.346(a)(6) of this title (relating to Records of Individual Monitoring Results).

(160) Transuranic waste--For the purposes of this chapter, wastes containing alpha emitting transuranic radionuclides with a half-life greater than five years at concentrations greater than 100 nanocuries/gram.

(161) Trustworthiness and reliability--Characteristics of an individual considered dependable in judgment, character, and performance, such that unescorted access to category 1 or category 2 quantities of radioactive material by that individual does not constitute an unreasonable risk to the public health and safety or security. A determination of trustworthiness and reliability for this purpose is based upon the results from a background investigation.

(162) Type A quantity (for packaging)--A quantity of radioactive material, the aggregate radioactivity of which does not exceed A 1 for special form radioactive material or A2 for normal form radioactive material, where A1 and A2 are given in or shall be determined by procedures in Appendix A to 10 Code of Federal Regulations Part 71 as amended through September 28, 1995 (60 FR 50264) (Packaging and Transportation of Radioactive Material).

(163) Type B quantity (for packaging)--A quantity of radioactive material greater than a Type A quantity.

(164) Unescorted access--Solitary access to an aggregated category 1 or category 2 quantity of radioactive material or the devices that contain the material.

(165) Unrefined and unprocessed ore--Ore in its natural form before any processing, such as grinding, roasting, beneficiating, or refining.

(166) Unrestricted area--Any area that is not a restricted area.

(167) User seal check (fit check)--An action conducted by the respirator user to determine if the respirator is properly seated to the face. Examples include negative pressure check, positive pressure check, irritant smoke check, or isoamyl acetate check.

(168) Very high radiation area--An area, accessible to individuals, in which radiation levels from radiation sources external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (five grays) in one hour at one meter from a source of radiation or one meter from any surface that the radiation penetrates.

(169) Violation--An infringement of any provision of the Texas Radiation Control Act (TRCA) or of any rule, order, or license condition of the commission issued under the TRCA or this chapter.

(170) Waste--Low-level radioactive wastes containing source, special nuclear, or byproduct material that are acceptable for disposal in a land disposal facility. For the purposes of this definition, low-level radioactive waste means radioactive waste not classified as

high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in paragraph (20)(B) - (E) of this section.

(171) Week--Seven consecutive days starting on Sunday.

(172) Weighting factor (w_r) for an organ or tissue (T)--The proportion of the risk of stochastic effects resulting from irradiation of that organ or tissue to the total risk of stochastic effects when the whole body is irradiated uniformly. For calculating the effective dose equivalent, the values of w_r are:
Figure: 30 TAC §336.2(172) (No change.)

(173) Whole body--For purposes of external exposure, head, trunk including male gonads, arms above the elbow, or legs above the knee.

(174) Worker--An individual engaged in activities under a license issued by the commission and controlled by a licensee, but does not include the licensee.

(175) Working level (WL)--Any combination of short-lived radon daughters in one liter of air that will result in the ultimate emission of 1.3×10^5 MeV of potential alpha particle energy. The short-lived radon daughters are: for radon-222: polonium-218, lead-214, bismuth-214, and polonium-214; and for radon-220: polonium-216, lead-212, bismuth-212, and polonium-212.

(176) Working level month (WLM)--An exposure to one working level for 170 hours (2,000 working hours per year divided by 12 months per year is approximately equal to 170 hours per month).

(177) Year--The period of time beginning in January used to determine compliance with the provisions of the rules in this chapter. The licensee shall change the starting date of the year used to determine compliance by the licensee provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2016.

TRD-201603979

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: September 18, 2016

For further information, please call: (512) 239-2613



SUBCHAPTER D. STANDARDS FOR PROTECTION AGAINST RADIATION

30 TAC §336.315, §336.357

Statutory Authority

The amendments are proposed under the Texas Radiation Control Act (TRCA), Texas Health and Safety Code (THSC), Chapter 401; THSC, §401.011, which provides the commission the authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, and the recovery and processing of source material; THSC, §401.051, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; THSC, §401.103, which authorizes the commission to

adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; THSC, §401.104, which requires the commission to provide rules for licensing for the disposal of radioactive substances; and THSC, §401.106, which authorizes the commission to adopt rules to exempt a source of radiation from the licensing requirements provided by the TRCA. The amendments are also proposed as authorized by Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendments implement THSC, Chapter 401, and are proposed to meet compatibility standards set by the United States Nuclear Regulatory Commission.

§336.315. General Requirements for Surveys and Monitoring.

(a) Each licensee shall make, or cause to be made, surveys that:

(1) are necessary for the licensee to comply with the rules in this chapter or conditions of the license; and

(2) are reasonable under the circumstances to evaluate:

(A) the magnitude and extent of radiation levels;

(B) concentrations or quantities of radioactive material;

and

(C) the potential radiological hazards of the radiation levels and residual radioactivity detected.

(b) The licensee shall ensure that instruments and equipment used for quantitative radiation measurements (e.g., dose rate and effluent monitoring) are calibrated:

(1) by a person licensed by the Texas Department of State Health Services, another Agreement State, a Licensing State, or the United States Nuclear Regulatory Commission to perform this service;

(2) at intervals not to exceed 12 months, unless a more restrictive time interval is specified in another part of this chapter or in the license; and

(3) for the types of radiation measured and at appropriate energies.

(c) All personnel dosimeters, except for direct and indirect reading pocket ionization chambers and those dosimeters used to measure the dose to any extremity, that require processing to determine the radiation dose and that are used by licensees to comply with §336.305 of this title (relating to Occupational Dose Limits for Adults), with other applicable provisions of this chapter, or with conditions specified in a license shall be processed and evaluated by a dosimetry processor:

(1) holding current personnel dosimetry accreditation from the National Voluntary Laboratory Accreditation Program (NVLAP) of the National Institute of Standards and Technology; and

(2) approved in this accreditation process for the type of radiation or radiations included in the NVLAP program that most closely approximates the type of radiation or radiations for which the individual wearing the dosimeter is monitored.

(d) Each licensee shall ensure that individuals who are required to use an individual monitoring device follow appropriate procedures in regard to selection of the type of device, location where it is worn, period of use, and precautions to prevent exposures that are not occupational dose to that individual.

(e) Regardless of §336.343(a) of this title (relating to Records of Surveys), records from surveys describing the location and amount

of subsurface residual radioactivity identified at the site must be kept with records important for decommissioning, and such records must be retained in accordance with §336.621 of this title (relating to Record-keeping for Decommissioning), as applicable.

§336.357. Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material.

(a) Specific exemption. A licensee that possesses radioactive waste that contains category 1 or category 2 quantities of radioactive material is exempt from the requirements of subsections (b) - (w) of this section. However, any radioactive waste that contains discrete sources, ion-exchange resins, or activated material that weighs less than 2,000 kilograms (4,409 pounds) is not exempt from the requirements of subsections (b) - (w) of this section. The licensee shall implement the following requirements to secure the radioactive waste:

(1) use [Use] continuous physical barriers that allow access to the radioactive waste only through established access control points;

(2) use [Use] a locked door or gate with monitored alarm at the access control point;

(3) assess [Assess] and respond to each actual or attempted unauthorized access to determine whether an actual or attempted theft, sabotage, or diversion occurred; and

(4) immediately [Immediately] notify the local law enforcement agency (LLEA) and request an armed response from the LLEA upon determination that there was an actual or attempted theft, sabotage, or diversion of the radioactive waste that contains category 1 or category 2 quantities of radioactive material.

(b) Personnel access authorization requirements for category 1 or category 2 quantities of radioactive material.

(1) General.

(A) Each licensee that possesses an aggregated quantity of radioactive material at or above the category 2 threshold shall establish, implement, and maintain its access authorization program in accordance with the requirements of this subsection and subsections (c) - (h) of this section.

(B) An applicant for a new license and each licensee, upon application for modification of its license, that would become newly subject to the requirements of this subsection and subsections (c) - (h) of this section, shall implement the requirements of this subsection and subsections (c) - (h) of this section, as appropriate, before taking possession of an aggregated category 1 or category 2 quantity of radioactive material.

(C) Any licensee that has not previously implemented the Security Orders or been subject to the provisions of this subsection and subsections (c) - (h) of this section shall implement the provisions of this subsection and subsections (c) - (h) of this section before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

(2) General performance objective. The licensee's access authorization program must ensure that the individuals specified in paragraph (3)(A) of this subsection are trustworthy and reliable.

(3) Applicability.

(A) Licensees shall subject the following individuals to an access authorization program:

(i) any [Any] individual whose assigned duties require unescorted access to category 1 or category 2 quantities of radioactive material or to any device that contains the radioactive material; and

(ii) reviewing [Reviewing] officials.

(B) Licensees need not subject the categories of individuals listed in subsection (f)(1) of this section to the investigation elements of the access authorization program.

(C) Licensees shall approve for unescorted access to category 1 or category 2 quantities of radioactive material only those individuals with job duties that require unescorted access to category 1 or category 2 quantities of radioactive material.

(D) Licensees may include individuals needing access to safeguards information-modified handling under 10 Code of Federal Regulations (CFR) Part 73, in the access authorization program under this subsection and subsections (c) - (h) of this section.

(c) Access authorization program requirements.

(1) Granting unescorted access authorization.

(A) Licensees shall implement the requirements of subsection (b) of this section, this subsection, and subsections (d) - (h) of this section for granting initial or reinstated unescorted access authorization.

(B) Individuals determined to be trustworthy and reliable shall also complete the security training required by subsection (j)(3) of this section before being allowed unescorted access to category 1 or category 2 quantities of radioactive material.

(2) Reviewing officials.

(A) Reviewing officials are the only individuals who may make trustworthiness and reliability determinations that allow individuals to have unescorted access to category 1 or category 2 quantities of radioactive materials possessed by the licensee.

(B) Each licensee shall name one or more individuals to be reviewing officials. After completing the background investigation on the reviewing official, the licensee shall provide under oath or affirmation, a certification that the reviewing official is deemed trustworthy and reliable by the licensee. The fingerprints of the named reviewing official must be taken by a law enforcement agency, Federal or State agencies that provide fingerprinting services to the public, or commercial fingerprinting services authorized by a State to take fingerprints. The licensee shall recertify that the reviewing official is deemed trustworthy and reliable every 10 years in accordance with subsection (d)(3) [(d)(2)] of this section.

(C) Reviewing officials must be permitted to have unescorted access to category 1 or category 2 quantities of radioactive materials or access to safeguards information or safeguards information-modified handling, if the licensee possesses safeguards information or safeguards information-modified handling.

(D) Reviewing officials cannot approve other individuals to act as reviewing officials.

(E) A reviewing official does not need to undergo a new background investigation before being named by the licensee as the reviewing official if:

(i) the [The] individual has undergone a background investigation that included fingerprinting and a Federal Bureau of Investigations (FBI) criminal history records check and has been determined to be trustworthy and reliable by the licensee; or

(ii) the [The] individual is subject to a category listed in subsection (f)(1) of this section.

(3) Informed consent.

(A) Licensees may not initiate a background investigation without the informed and signed consent of the subject individual. This consent must include authorization to share personal information with other individuals or organizations as necessary to complete the background investigation. Before a final adverse determination, the licensee shall provide the individual with an opportunity to correct any inaccurate or incomplete information that is found during the background investigation. Licensees do not need to obtain signed consent from those individuals that meet the requirements of subsection (d)(2) of this section. A signed consent must be obtained prior to any reinvestigation.

(B) The subject individual may withdraw his or her consent at any time. Licensees shall inform the individual that:

(i) if [H] an individual withdraws his or her consent, the licensee may not initiate any elements of the background investigation that were not in progress at the time the individual withdrew his or her consent; and

(ii) the [The] withdrawal of consent for the background investigation is sufficient cause for denial or termination of unescorted access authorization.

(4) Personal history disclosure. Any individual who is applying for unescorted access authorization shall disclose the personal history information that is required by the licensee's access authorization program for the reviewing official to make a determination of the individual's trustworthiness and reliability. Refusal to provide, or the falsification of, any personal history information required by subsection (b) of this section, this subsection, and subsections (d) - (h) of this section is sufficient cause for denial or termination of unescorted access.

(5) Determination basis.

(A) The reviewing official shall determine whether to permit, deny, unfavorably terminate, maintain, or administratively withdraw an individual's unescorted access authorization based on an evaluation of all of the information collected to meet the requirements of subsection (b) of this section, this subsection, and subsections (d) - (h) of this section.

(B) The reviewing official may not permit any individual to have unescorted access until the reviewing official has evaluated all of the information collected to meet the requirements of subsection (b) of this section, this subsection, and subsections (d) - (h) of this section and determined that the individual is trustworthy and reliable. The reviewing official may deny unescorted access to any individual based on information obtained at any time during the background investigation.

(C) The licensee shall document the basis for concluding whether or not there is reasonable assurance that an individual is trustworthy and reliable.

(D) The reviewing official may terminate or administratively withdraw an individual's unescorted access authorization based on information obtained after the background investigation has been completed and the individual granted unescorted access authorization.

(E) Licensees shall maintain a list of persons currently approved for unescorted access authorization. When a licensee determines that a person no longer requires unescorted access or meets the access authorization requirements, the licensee shall remove the person from the approved list as soon as possible, but no-later-than seven working days, and take prompt measures to ensure that the individual is unable to have unescorted access to the material.

(6) Procedures. Licensees shall develop, implement, and maintain written procedures for implementing the access authorization program. The procedures must include provisions for the notification of individuals who are denied unescorted access. The procedures must include provisions for the review, at the request of the affected individual, of a denial or termination of unescorted access authorization. The procedures must contain a provision to ensure that the individual is informed of the grounds for the denial or termination of unescorted access authorization and allow the individual an opportunity to provide additional relevant information.

(7) Right to correct and complete information.

(A) Prior to any final adverse determination, licensees shall provide each individual subject to subsection (b) of this section, this subsection, and subsections (d) - (h) of this section with the right to complete, correct, and explain information obtained as a result of the licensee's background investigation. Confirmation of receipt by the individual of this notification must be maintained by the licensee for a period of one year from the date of the notification.

(B) If, after reviewing his or her criminal history record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, update, or explain anything in the record, the individual may initiate challenge procedures. These procedures include direct application by the individual challenging the record to the law enforcement agency that contributed the questioned information or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, ATTN: SCU, Mod. D-2, 1000 Custer Hollow Road, Clarksburg, WV 26306, as set forth in 28 CFR §§16.30 - 16.34. In the latter case, the FBI will forward the challenge to the agency that submitted the data, and will request that the agency verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division will make any changes necessary in accordance with the information supplied by that agency. Licensees must provide at least 10 days for an individual to initiate action to challenge the results of an FBI criminal history records check after the record is made available for his or her review. The licensee may make a final adverse determination based upon the criminal history records only after receipt of the FBI's confirmation or correction of the record.

(8) Records.

(A) The licensee shall retain documentation regarding the trustworthiness and reliability of individual employees for three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material.

(B) The licensee shall retain a copy of the current access authorization program procedures as a record for three years after the procedure is no longer needed. If any portion of the procedure is superseded, the licensee shall retain the superseded material for three years after the record is superseded.

(C) The licensee shall retain the list of persons approved for unescorted access authorization for three years after the list is superseded or replaced.

(d) Background investigations.

(1) Initial investigation. Before allowing an individual unescorted access to category 1 or category 2 quantities of radioactive material or to the devices that contain the material, licensees shall complete a background investigation of the individual seeking unescorted access authorization. The scope of the investigation must encompass at least the seven years preceding the date of the background investiga-

tion or since the individual's eighteenth birthday, whichever is shorter. The background investigation must include at a minimum:

(A) fingerprints [~~Fingerprinting~~] and an FBI identification and criminal history records check in accordance with subsection (e) of this section;

(B) verification [~~Verification~~] of true identity. Licensees shall verify the true identity of the individual applying for unescorted access authorization to ensure that the applicant is who he or she claims to be. A licensee shall review official identification documents (e.g., driver's license; passport; government identification; certificate of birth issued by the state, province, or country of birth) and compare the documents to personal information data provided by the individual to identify any discrepancy in the information. Licensees shall document the type, expiration, and identification number of the identification document, or maintain a photocopy of identifying documents on file in accordance with subsection (g) of this section. Licensees shall certify in writing that the identification was properly reviewed and shall maintain the certification and all related documents for review upon inspection;

(C) employment [~~Employment~~] history verification. Licensees shall complete an employment history verification, including military history. Licensees shall verify the individual's employment with each previous employer for the most recent seven years before the date of application;

(D) verification [~~Verification~~] of education. Licensees shall verify the individual's education during the claimed period;

(E) character [~~Character~~] and reputation determination. Licensees shall complete reference checks to determine the character and reputation of the individual who has applied for unescorted access authorization. Unless other references are not available, reference checks may not be conducted with any person who is known to be a close member of the individual's family, including but not limited to the individual's spouse, parents, siblings, or children, or any individual who resides in the individual's permanent household. Reference checks under subsections (b) and (c) of this section, this subsection, and subsections (e) - (h) of this section must be limited to whether the individual has been and continues to be trustworthy and reliable;

(F) the [~~The~~] licensee shall also, to the extent possible, obtain independent information to corroborate the information provided by the individual (e.g., seek references not supplied by the individual); and

(G) if [~~If~~] a previous employer, educational institution, or any other entity with which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within a time frame deemed appropriate by the licensee, but at least after 10 business days of the request or if the licensee is unable to reach the entity, the licensee shall document the refusal, unwillingness, or inability in the record of investigation and attempt to obtain the information from an alternate source.

(2) Grandfathering.

(A) Individuals who have been determined to be trustworthy and reliable for unescorted access to category 1 or category 2 quantities of radioactive material under the Fingerprint Orders may continue to have unescorted access to category 1 and category 2 quantities of radioactive material without further investigation. These individuals shall be subject to the reinvestigation requirement.

(B) Individuals who have been determined to be trustworthy and reliable under the provisions of 10 CFR Part 73 or the Security Orders for access to safeguards information, safeguards infor-

mation-modified handling, or risk-significant material may have unescorted access to category 1 and category 2 quantities of radioactive material without further investigation. The licensee shall document that the individual was determined to be trustworthy and reliable under the provisions of 10 CFR Part 73 or a Security Order. Security Order, in this context, refers to any order that was issued by the United States Nuclear Regulatory Commission (NRC) that required fingerprints and an FBI criminal history records check for access to safeguards information, safeguards information-modified handling, or risk significant material such as special nuclear material or large quantities of uranium hexafluoride. These individuals shall be subject to the reinvestigation requirement.

(3) Reinvestigations. Licensees shall conduct a reinvestigation every 10 years for any individual with unescorted access to category 1 or category 2 quantities of radioactive material. The reinvestigation shall consist of fingerprinting and an FBI identification and criminal history records check in accordance with subsection (e) of this section. The reinvestigations must be completed within 10 years of the date on which these elements were last completed.

(e) Requirements for criminal history records checks of individuals granted unescorted access to category 1 or category 2 quantities of radioactive material.

(1) General performance objective and requirements.

(A) Except for those individuals listed in subsection (f) of this section and those individuals grandfathered under subsection (d)(2) of this section, each licensee subject to the provisions of subsections (b) - (d) of this section, this subsection, and subsections (f) - (h) of this section shall fingerprint each individual who is to be permitted unescorted access to category 1 or category 2 quantities of radioactive material. Licensees shall transmit all collected fingerprints to the NRC for transmission to the FBI. The licensee shall use the information received from the FBI as part of the required background investigation to determine whether to grant or deny further unescorted access to category 1 or category 2 quantities of radioactive materials for that individual.

(B) The licensee shall notify each affected individual that his or her fingerprints will be used to secure a review of his or her criminal history record and shall inform him or her of the procedures for revising the record or adding explanations to the record.

(C) Fingerprinting is not required if a licensee is reinstating an individual's unescorted access authorization to category 1 or category 2 quantities of radioactive materials if:

(i) the [~~The~~] individual returns to the same facility that granted unescorted access authorization within 365 days of the termination of his or her unescorted access authorization; and

(ii) the [~~The~~] previous access was terminated under favorable conditions.

(D) Fingerprints do not need to be taken if an individual who is an employee of a licensee, contractor, manufacturer, or supplier has been granted unescorted access to category 1 or category 2 quantities of radioactive material, access to safeguards information, or safeguards information-modified handling by another licensee, based upon a background investigation conducted under this section, the Fingerprint Orders, or 10 CFR Part 73. An existing criminal history records check file may be transferred to the licensee asked to grant unescorted access in accordance with the provisions of subsection (g)(3) of this section.

(E) Licensees shall use the information obtained as part of a criminal history records check solely for the purpose of determin-

ing an individual's suitability for unescorted access authorization to category 1 or category 2 quantities of radioactive materials, access to safeguards information, or safeguards information-modified handling.

(2) Prohibitions.

(A) Licensees may not base a final determination to deny an individual unescorted access authorization to category 1 or category 2 quantities of radioactive material solely on the basis of information received from the FBI involving:

(i) an [An] arrest more than one year old for which there is no information of the disposition of the case; or

(ii) an [An] arrest that resulted in dismissal of the charge or an acquittal.

(B) Licensees may not use information received from a criminal history records check obtained under subsections (b) - (d) of this section, this subsection, and subsections (f) - (h) of this section in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States nor shall licensees use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, gender, or age.

(3) Procedures for processing of fingerprint checks.

(A) For the purpose of complying with subsections (b) - (d) of this section, this subsection, and subsections (f) - (h) of this section, licensees shall use an appropriate method listed in 10 CFR §37.7 to submit to the United States Nuclear Regulatory Commission, Director, Division of Facilities and Security, 11545 Rockville Pike, ATTN: Criminal History Program/Mail Stop T-03B46M [~~TWB-05 B32M~~], Rockville, Maryland 20852-2738, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ), electronic fingerprint scan or, where practicable, other fingerprint record for each individual requiring unescorted access to category 1 or category 2 quantities of radioactive material. Copies of these forms may be obtained by writing the Office of the Chief Information Officer [~~Information Services~~], U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; by calling (630) 829-9565; or by e-mail to FORMS.Resource@nrc.gov. Guidance on submitting electronic fingerprints can be found at <http://www.nrc.gov/site-help/e-submittals.html>.

(B) Fees for the processing of fingerprint checks are due upon application. Licensees shall submit payment with the application for the processing of fingerprints through corporate check, certified check, cashier's check, money order, or electronic payment, made payable to "U.S. NRC." (For guidance on making electronic payments, contact the Security Branch, Division of Facilities and Security at (301) 415-7513 [~~492-3534~~].) Combined payment for multiple applications is acceptable. The NRC publishes the amount of the fingerprint check application fee on the NRC's public website. (To find the current fee amount, go to the Electronic Submittals page at <http://www.nrc.gov/site-help/e-submittals.html> and see the link for the Criminal History under Electronic Submission Systems.)

(C) The NRC will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks.

(f) Relief from fingerprinting, identification, and criminal history records checks and other elements of background investigations for designated categories of individuals permitted unescorted access to certain radioactive materials.

(1) Fingerprinting, and the identification and criminal history records checks required by §149 of the Atomic Energy Act of

1954, as amended, and other elements of the background investigation, are not required for the following individuals prior to granting unescorted access to category 1 or category 2 quantities of radioactive materials:

(A) an [An] employee of the NRC or of the Executive Branch of the United States (U.S.) Government who has undergone fingerprinting for a prior U.S. Government criminal history records check;

(B) a [A] Member of Congress;

(C) an [An] employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history records check;

(D) the [The] Governor of a State or his or her designated State employee representative;

(E) Federal, State, or local law enforcement personnel;

(F) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;

(G) Agreement State employees conducting security inspections on behalf of the NRC under an agreement executed under §274.i. of the Atomic Energy Act;

(H) representatives [Representatives] of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who have been certified by the NRC;

(I) emergency [Emergency] response personnel who are responding to an emergency;

(J) commercial [Commercial] vehicle drivers for road shipments of category 1 and category 2 quantities of radioactive material;

(K) package [Package] handlers at transportation facilities such as freight terminals and railroad yards;

(L) any [Any] individual who has an active federal security clearance, provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that granted the federal security clearance or reviewed the criminal history records check must be provided to the licensee. The licensee shall retain this documentation for a period of three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material; and

(M) any [Any] individual employed by a service provider licensee for which the service provider licensee has conducted the background investigation for the individual and approved the individual for unescorted access to category 1 or category 2 quantities of radioactive material. Written verification from the service provider must be provided to the licensee. The licensee shall retain the documentation for a period of three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material; and

(2) Fingerprinting, and the identification and criminal history records checks required by §149 of the Atomic Energy Act of 1954, as amended, are not required for an individual who has had a favorably adjudicated U.S. Government criminal history records check within the last five years, under a comparable U.S. Government program involving fingerprinting and an FBI identification and criminal history records check provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that reviewed the criminal history records check must be pro-

vided to the licensee. The licensee shall retain this documentation for a period of three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material. These programs include, but are not limited to:

- (A) National Agency Check;
- (B) Transportation Worker Identification Credentials under 49 CFR Part 1572;
- (C) Bureau of Alcohol, Tobacco, Firearms, and Explosives background check and clearances under 27 CFR Part 555;
- (D) Health and Human Services security risk assessments for possession and use of select agents and toxins under 42 CFR Part 73;
- (E) Hazardous Material security threat assessment for hazardous material endorsement to commercial drivers license under 49 CFR Part 1572; and
- (F) Customs and Border Protection's Free and Secure Trade Program.
- (g) Protection of information.

(1) Each licensee who obtains background information on an individual under subsections (b) - (f) of this section, this subsection, and subsection (h) of this section shall establish and maintain a system of files and written procedures for protection of the records and the personal information from unauthorized disclosure.

(2) The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his or her representative, or to those who have a need to have access to the information in performing assigned duties in the process of granting or denying unescorted access to category 1 or category 2 quantities of radioactive material, safeguards information, or safeguards information-modified handling. No individual authorized to have access to the information may disseminate the information to any other individual who does not have a need to know.

(3) The personal information obtained on an individual from a background investigation may be provided to another licensee:

- (A) upon ~~[Upon]~~ the individual's written request to the licensee holding the data to disseminate the information contained in his or her file; and
- (B) ~~the [The]~~ recipient licensee verifies information such as name, date of birth, social security number, gender, and other applicable physical characteristics.

(4) The licensee shall make background investigation records obtained under subsections (b) - (f) of this section, this subsection, and subsection (h) of this section available for examination by an authorized representative of the commission ~~[NRC]~~ to determine compliance with the regulations and laws.

(5) The licensee shall retain all fingerprint and criminal history records (including data indicating no record) received from the FBI or a copy of these records if the individual's file has been transferred on an individual for three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material.

(h) Access authorization program review.

(1) Each licensee shall be responsible for the continuing effectiveness of the access authorization program. Each licensee shall ensure that access authorization programs are reviewed to confirm compliance with the requirements of subsections (b) - (g) of this section

and this subsection and that comprehensive actions are taken to correct any noncompliance identified. The review program shall evaluate all program performance objectives and requirements. Each licensee shall periodically (at least annually) review the access authorization program content and implementation.

(2) The results of the reviews, along with any recommendations, must be documented. Each review report must identify conditions that are adverse to the proper performance of the access authorization program, the cause of the condition(s), and, when appropriate, recommend corrective actions, and corrective actions taken. The licensee shall review the findings and take any additional corrective actions necessary to preclude repetition of the condition, including re-assessment of the deficient areas where indicated.

(3) Review records must be maintained for three years.

(i) Security program.

(1) Applicability.

(A) Each licensee that possesses an aggregated category 1 or category 2 quantity of radioactive material shall establish, implement, and maintain a security program in accordance with the requirements of this subsection and subsections (j) - (q) of this section.

(B) An applicant for a new license, and each licensee that would become newly subject to the requirements of this subsection and subsections (j) - (q) of this section upon application for modification of its license, shall implement the requirements of this subsection and subsections (j) - (q) of this section, as appropriate, before taking possession of an aggregated category 1 or category 2 quantity of radioactive material.

(C) Any licensee that has not previously implemented the Security Orders or been subject to the provisions of this subsection and subsections (j) - (q) of this section shall provide written notification to the commission ~~[NRC regional office specified in 10 CFR §30.6]~~ at least 90 days before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

(2) General performance objective. Each licensee shall establish, implement, and maintain a security program that is designed to monitor and, without delay, detect, assess, and respond to an actual or attempted unauthorized access to category 1 or category 2 quantities of radioactive material.

(3) Program features. Each licensee's security program must include the program features, as appropriate, described in subsections (j) - (p) of this section.

(j) General security program requirements.

(1) Security plan.

(A) Each licensee identified in subsection (i)(1) of this section shall develop a written security plan specific to its facilities and operations. The purpose of the security plan is to establish the licensee's overall security strategy to ensure the integrated and effective functioning of the security program required by subsection (i) of this section, this subsection, and subsections (k) - (q) of this section ~~[this subsection]~~. The security plan must, at a minimum:

(i) ~~describe [Describe]~~ the measures and strategies used to implement the requirements of subsection (i) of this section, this subsection, and subsections (k) - (q) of this section ~~[this subsection]~~; and

(ii) ~~identify [Identify]~~ the security resources, equipment, and technology used to satisfy the requirements of subsection (i)

of this section, this subsection, and subsections (k) - (q) of this section [this subsection].

(B) The security plan must be reviewed and approved by the individual with overall responsibility for the security program.

(C) A licensee shall revise its security plan as necessary to ensure the effective implementation of the executive director's requirements. The licensee shall ensure that:

(i) the [The] revision has been reviewed and approved by the individual with overall responsibility for the security program; and

(ii) the [The] affected individuals are instructed on the revised plan before the changes are implemented.

(D) The licensee shall retain a copy of the current security plan as a record for three years after the security plan is no longer required. If any portion of the plan is superseded, the licensee shall retain the superseded material for three years after the record is superseded.

(2) Implementing procedures.

(A) The licensee shall develop and maintain written procedures that document how the requirements of subsection (i) of this section, this subsection, and subsections (k) - (q) of this section and the security plan will be met.

(B) The implementing procedures and revisions to these procedures must be approved in writing by the individual with overall responsibility for the security program.

(C) The licensee shall retain a copy of the current procedure as a record for three years after the procedure is no longer needed. Superseded portions of the procedure must be retained for three years after the record is superseded.

(3) Training.

(A) Each licensee shall conduct training to ensure that those individuals implementing the security program possess and maintain the knowledge, skills, and abilities to carry out their assigned duties and responsibilities effectively. The training must include instruction in:

(i) the [The] licensee's security program and procedures to secure category 1 or category 2 quantities of radioactive material and the purposes and functions of the security measures employed;

(ii) the [The] responsibility to report promptly to the licensee any condition that causes or may cause a violation of the requirements of the commission, the NRC, or any Agreement State;

(iii) the [The] responsibility of the licensee to report promptly to the LLEA and licensee any actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material; and

(iv) the [The] appropriate response to security alarms.

(B) In determining those individuals who shall be trained on the security program, the licensee shall consider each individual's assigned activities during authorized use and response to potential situations involving actual or attempted theft, diversion, or sabotage of category 1 or category 2 quantities of radioactive material. The extent of the training must be commensurate with the individual's potential involvement in the security of category 1 or category 2 quantities of radioactive material.

(C) Refresher training must be provided at a frequency not to exceed 12 months and when significant changes have been made to the security program. This training must include:

(i) review [Review] of the training requirements of this paragraph and any changes made to the security program since the last training;

(ii) reports [Reports] on any relevant security issues, problems, and lessons learned;

(iii) relevant [Relevant] results of commission [NRC] inspections; and

(iv) relevant [Relevant] results of the licensee's program review and testing and maintenance.

(D) The licensee shall maintain records of the initial and refresher training for three years from the date of the training. The training records must include dates of the training, topics covered, a list of licensee personnel in attendance, and related information.

(4) Protection of information.

(A) Licensees authorized to possess category 1 or category 2 quantities of radioactive material shall limit access to and unauthorized disclosure of their security plan, implementing procedures, and the list of individuals that have been approved for unescorted access.

(B) Efforts to limit access shall include the development, implementation, and maintenance of written policies and procedures for controlling access to, and for proper handling and protection against unauthorized disclosure of, the security plan and implementing procedures.

(C) Before granting an individual access to the security plan or implementing procedures, licensees shall:

(i) evaluate [Evaluate] an individual's need to know the security plan or implementing procedures; and

(ii) if [If] the individual has not been authorized for unescorted access to category 1 or category 2 quantities of radioactive material, safeguards information, or safeguards information-modified handling, the licensee must complete a background investigation to determine the individual's trustworthiness and reliability. A trustworthiness and reliability determination shall be conducted by the reviewing official and shall include the background investigation elements contained in subsection (d)(1)(B) - (G) of this section.

(D) Licensees need not subject the following individuals to the background investigation elements for protection of information:

(i) the [The] categories of individuals listed in subsection (f)(1) of this section; or

(ii) security [Security] service provider employees, provided written verification that the employee has been determined to be trustworthy and reliable, by the required background investigation in subsection (d)(1)(B) - (G) of this section, has been provided by the security service provider.

(E) The licensee shall document the basis for concluding that an individual is trustworthy and reliable and should be granted access to the security plan or implementing procedures.

(F) Licensees shall maintain a list of persons currently approved for access to the security plan or implementing procedures. When a licensee determines that a person no longer needs access to the security plan or implementing procedures or no longer meets the access

authorization requirements for access to the information, the licensee shall remove the person from the approved list as soon as possible, but no-later-than seven working days, and take prompt measures to ensure that the individual is unable to obtain the security plan or implementing procedures.

(G) When not in use, the licensee shall store its security plan and implementing procedures in a manner to prevent unauthorized access. Information stored in non-removable electronic form must be password protected.

(H) The licensee shall retain as a record for three years after the document is no longer needed:

(i) a [A] copy of the information protection procedures; and

(ii) the [The] list of individuals approved for access to the security plan or implementing procedures.

(k) LLEA coordination.

(1) A licensee subject to subsections (i) and (j) of this section, this subsection, and subsections (l) - (q) of this section shall coordinate, to the extent practicable, with an LLEA for responding to threats to the licensee's facility, including any necessary armed response. The information provided to the LLEA must include:

(A) a [A] description of the facilities and the category 1 and category 2 quantities of radioactive materials along with a description of the licensee's security measures that have been implemented to comply with subsections (i) and (j) of this section, this subsection, and subsections (l) - (q) of this section; and

(B) a [A] notification that the licensee will request a timely armed response by the LLEA to any actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of material.

(2) The licensee shall notify the executive director within three business days if:

(A) the [The] LLEA has not responded to the request for coordination within 60 days of the coordination request; or

(B) the [The] LLEA notifies the licensee that the LLEA does not plan to participate in coordination activities.

(3) The licensee shall document its efforts to coordinate with the LLEA. The documentation must be kept for three years.

(4) The licensee shall coordinate with the LLEA at least every 12 months, or when changes to the facility design or operation adversely affect the potential vulnerability of the licensee's material to theft, sabotage, or diversion.

(l) Security zones.

(1) Licensees shall ensure that all aggregated category 1 and category 2 quantities of radioactive material are used or stored within licensee established security zones. Security zones may be permanent or temporary.

(2) Temporary security zones must be established as necessary to meet the licensee's transitory or intermittent business activities, such as periods of maintenance, source delivery, and source replacement.

(3) Security zones must, at a minimum, allow unescorted access only to approved individuals through:

(A) isolation [Isolation] of category 1 and category 2 quantities of radioactive materials by the use of continuous physical

barriers that allow access to the security zone only through established access control points. A physical barrier is a natural or man-made structure or formation sufficient for the isolation of the category 1 or category 2 quantities of radioactive material within a security zone; or

(B) direct [Direct] control of the security zone by approved individuals at all times; or

(C) a [A] combination of continuous physical barriers and direct control.

(4) For category 1 quantities of radioactive material during periods of maintenance, source receipt, preparation for shipment, installation, or source removal or exchange, the licensee shall, at a minimum, provide sufficient individuals approved for unescorted access to maintain continuous surveillance of sources in temporary security zones and in any security zone in which physical barriers or intrusion detection systems have been disabled to allow such activities.

(5) Individuals not approved for unescorted access to category 1 or category 2 quantities of radioactive material must be escorted by an approved individual when in a security zone.

(m) Monitoring, detection, and assessment.

(1) Monitoring and detection.

(A) Licensees shall establish and maintain the capability to continuously monitor and detect without delay all unauthorized entries into its security zones. Licensees shall provide the means to maintain continuous monitoring and detection capability in the event of a loss of the primary power source or provide for an alarm and response in the event of a loss of the capability to continuously monitor and detect unauthorized entries.

(B) Monitoring and detection must be performed by:

(i) a [A] monitored intrusion detection system that is linked to an onsite or offsite central monitoring facility;

(ii) electronic [Electronic] devices for intrusion detection alarms that will alert nearby facility personnel;

(iii) a [A] monitored video surveillance system;

(iv) direct [Direct] visual surveillance by approved individuals located within the security zone; or

(v) direct [Direct] visual surveillance by a licensee designated individual located outside the security zone.

(C) A licensee subject to subsections (i) - (l) of this section, this subsection, and subsections (n) - (q) of this section shall also have a means to detect unauthorized removal of the radioactive material from the security zone. This detection capability must provide:

(i) for [For] category 1 quantities of radioactive material, immediate detection of any attempted unauthorized removal of the radioactive material from the security zone. Such immediate detection capability must be provided by:

(I) electronic [Electronic] sensors linked to an alarm;

(II) continuous [Continuous] monitored video surveillance; or

(III) direct [Direct] visual surveillance.

(ii) For category 2 quantities of radioactive material, weekly verification through physical checks, tamper indicating devices, use, or other means to ensure that the radioactive material is present.

(2) Assessment. Licensees shall immediately assess each actual or attempted unauthorized entry into the security zone to determine whether the unauthorized access was an actual or attempted theft, sabotage, or diversion.

(3) Personnel communications and data transmission. For personnel and automated or electronic systems supporting the licensee's monitoring, detection, and assessment systems, licensees shall:

(A) maintain [~~Maintain~~] continuous capability for personnel communication and electronic data transmission and processing among site security systems; and

(B) provide [~~Provide~~] an alternative communication capability for personnel, and an alternative data transmission and processing capability, in the event of a loss of the primary means of communication or data transmission and processing. Alternative communications and data transmission systems may not be subject to the same failure modes as the primary systems.

(4) Response. Licensees shall immediately respond to any actual or attempted unauthorized access to the security zones, or actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material at licensee facilities or temporary job sites. For any unauthorized access involving an actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material, the licensee's response shall include requesting, without delay, an armed response from the LLEA.

(n) Maintenance and testing.

(1) Each licensee subject to subsections (i) - (m) of this section, this subsection, and subsections (o) - (q) of this section shall implement a maintenance and testing program to ensure that intrusion alarms, associated communication systems, and other physical components of the systems used to secure or detect unauthorized access to radioactive material are maintained in operable condition and capable of performing their intended function when needed. The equipment relied on to meet the security requirements of this section must be inspected and tested for operability and performance at the manufacturer's suggested frequency. If there is no manufacturer's suggested frequency, the testing must be performed at least annually, not to exceed 12 months.

(2) The licensee shall maintain records on the maintenance and testing activities for three years.

(o) Requirements for mobile devices. Each licensee that possesses mobile devices containing category 1 or category 2 quantities of radioactive material must:

(1) have [~~Have~~] two independent physical controls that form tangible barriers to secure the material from unauthorized removal when the device is not under direct control and constant surveillance by the licensee; and

(2) for [~~For~~] devices in or on a vehicle or trailer, unless the health and safety requirements for a site prohibit the disabling of the vehicle, the licensee shall utilize a method to disable the vehicle or trailer when not under direct control and constant surveillance by the licensee. Licensees shall not rely on the removal of an ignition key to meet this requirement.

(p) Security program review.

(1) Each licensee shall be responsible for the continuing effectiveness of the security program. Each licensee shall ensure that the security program is reviewed to confirm compliance with the requirements of subsections (i) - (o) of this section, this subsection, and subsection (q) of this section and that comprehensive actions are taken to

correct any noncompliance that is identified. The review must include the radioactive material security program content and implementation. Each licensee shall periodically (at least annually) review the security program content and implementation.

(2) The results of the review, along with any recommendations, must be documented. Each review report must identify conditions that are adverse to the proper performance of the security program, the cause of the condition(s), and, when appropriate, recommend corrective actions, and corrective actions taken. The licensee shall review the findings and take any additional corrective actions necessary to preclude repetition of the condition, including reassessment of the deficient areas where indicated.

(3) The licensee shall maintain the review documentation for three years.

(q) Reporting of events.

(1) The licensee shall immediately notify the LLEA after determining that an unauthorized entry resulted in an actual or attempted theft, sabotage, or diversion of a category 1 or category 2 quantity of radioactive material. As soon as possible after initiating a response, but not at the expense of causing delay or interfering with the LLEA response to the event, the licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 [and the NRC's Operations Center at (301) 816-5100]. In no case shall the notification to the commission or the NRC be later than four hours after the discovery of any attempted or actual theft, sabotage, or diversion.

(2) The licensee shall assess any suspicious activity related to possible theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material and notify the LLEA as appropriate. As soon as possible but not later than four hours after notifying the LLEA, the licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 [and the NRC's Operations Center at (301) 816-5100].

(3) The initial telephonic notification required by paragraph (1) of this subsection must be followed, within a period of 30 days, by a written report submitted to the executive director [and the NRC by an appropriate method listed in 40 CFR §37.7]. The report must include sufficient information for commission [NRC] analysis and evaluation, including identification of any necessary corrective actions to prevent future instances.

(r) Additional requirements for transfer of category 1 and category 2 quantities of radioactive material. A licensee transferring a category 1 or category 2 quantity of radioactive material to a licensee of the commission, the NRC, or an Agreement State shall meet the license verification provisions listed in this subsection instead of those listed in §336.331(d) of this title (relating to Transfer of Radioactive Material):

(1) Any licensee transferring category 1 quantities of radioactive material to a licensee of the commission, the NRC, or an Agreement State, prior to conducting such transfer, shall verify with the NRC's license verification system or the license issuing authority that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred and that the licensee is authorized to receive radioactive material at the location requested for delivery. If the verification is conducted by contacting the license issuing authority, the transferor shall document the verification. For transfers within the same organization, the licensee does not need to verify the transfer.

(2) Any licensee transferring category 2 quantities of radioactive material to a licensee of the commission, the NRC, or an

Agreement State, prior to conducting such transfer, shall verify with the NRC's license verification system or the license issuing authority that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred. If the verification is conducted by contacting the license issuing authority, the transferor shall document the verification. For transfers within the same organization, the licensee does not need to verify the transfer.

(3) In an emergency where the licensee cannot reach the license issuing authority and the license verification system is nonfunctional, the licensee may accept a written certification by the transferee that it is authorized by license to receive the type, form, and quantity of radioactive material to be transferred. The certification must include the license number, current revision number, issuing agency, expiration date, and for a category 1 shipment the authorized address. The licensee shall keep a copy of the certification. The certification must be confirmed by use of the NRC's license verification system or by contacting the license issuing authority by the end of the next business day.

(4) The transferor shall keep a copy of the verification documentation as a record for three years.

(s) Applicability of physical protection of category 1 and category 2 quantities of radioactive material during transit. The shipping licensee shall be responsible for meeting the requirements of subsection (r) of this section, this subsection, and subsections (t) - (w) of this section unless the receiving licensee has agreed in writing to arrange for the in-transit physical protection required under subsection (r) of this section, this subsection, and subsections (t) - (w) of this section.

(t) Preplanning and coordination of shipment of category 1 or category 2 quantities of radioactive material.

(1) Each licensee that plans to transport, or deliver to a carrier for transport, licensed material that is a category 1 quantity of radioactive material outside the confines of the licensee's facility or other place of use or storage shall:

(A) preplan [~~Preplan~~] and coordinate shipment arrival and departure times with the receiving licensee;

(B) preplan [~~Preplan~~] and coordinate shipment information with the governor or the governor's designee of any state through which the shipment will pass to:

(i) discuss [~~Discuss~~] the state's intention to provide law enforcement escorts; and

(ii) identify [~~Identify~~] safe havens; and

(C) document [~~Document~~] the preplanning and coordination activities.

(2) Each licensee that plans to transport, or deliver to a carrier for transport, licensed material that is a category 2 quantity of radioactive material outside the confines of the licensee's facility or other place of use or storage shall coordinate the shipment no-later-than arrival time and the expected shipment arrival with the receiving licensee. The licensee shall document the coordination activities.

(3) Each licensee who receives a shipment of a category 2 quantity of radioactive material shall confirm receipt of the shipment with the originator. If the shipment has not arrived by the no-later-than arrival time, the receiving licensee shall notify the originator.

(4) Each licensee, who transports or plans to transport a shipment of a category 2 quantity of radioactive material, and determines that the shipment will arrive after the no-later-than arrival time provided pursuant to paragraph (2) of this subsection, shall promptly notify the receiving licensee of the new no-later-than arrival time.

(5) The licensee shall retain a copy of the documentation for preplanning and coordination and any revision thereof as a record for three years.

(u) Advance notification of shipment of category 1 quantities of radioactive material. As specified in paragraphs (1) and (2) of this subsection, each licensee shall provide advance notification to the NRC and the governor of a state, or the governor's designee, of the shipment of licensed material in a category 1 quantity, through or across the boundary of the state, before the transport or delivery to a carrier for transport of the licensed material outside the confines of the licensee's facility or other place of use or storage.

(1) Procedures for submitting advance notification.

(A) The notification must be made to the commission [NRC] and to the office of each appropriate governor or governor's designee. The contact information, including telephone and mailing addresses, of governors and governors' designees, is available on the NRC's website at <https://scp.nrc.gov/special/designee.pdf> [~~<http://nre-stp.ornl.gov/special/designee.pdf>~~]. A list of the contact information is also available upon request from the Director, Division of Material, State, Tribal, and Rulemaking Programs, Office of Nuclear Material Safety and Safeguards [~~Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs~~], U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. [Notifications to the NRC must be to the NRC's Director, Division of Security Policy, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. The notification to the NRC may be made by e-mail to RAMQC_SHIPMENTS@nrc.gov or by fax to (301) 816-5151.]

(B) A notification delivered by mail must be post-marked at least seven days before transport of the shipment commences at the shipping facility.

(C) A notification delivered by any means other than mail must reach the commission [NRC] at least four days before the transport of the shipment commences and must reach the office of the governor or the governor's designee at least four days before transport of a shipment within or through the state.

(2) Information to be furnished in advance notification of shipment. Each advance notification of shipment of category 1 quantities of radioactive material must contain the following information, if available at the time of notification:

(A) the [~~The~~] name, address, and telephone number of the shipper, carrier, and receiver of the category 1 radioactive material;

(B) the [~~The~~] license numbers of the shipper and receiver;

(C) a [~~A~~] description of the radioactive material contained in the shipment, including the radionuclides and quantity;

(D) the [~~The~~] point of origin of the shipment and the estimated time and date that shipment will commence;

(E) the [~~The~~] estimated time and date that the shipment is expected to enter each state along the route;

(F) the [~~The~~] estimated time and date of arrival of the shipment at the destination; and

(G) a [~~A~~] point of contact, with a telephone number, for current shipment information.

(3) Revision notice.

(A) The licensee shall provide any information not previously available at the time of the initial notification, as soon as the information becomes available but not later than commencement of the shipment, to the governor of the state or the governor's designee and to the commission [NRC's Director of Nuclear Security, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001].

(B) A licensee shall promptly notify the governor of the state or the governor's designee of any changes to the information provided in accordance with paragraph (2) of this subsection and subparagraph (A) of this paragraph. The licensee shall also immediately notify the commission [NRC's Director, Division of Security Policy, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001], of any such changes.

(4) Cancellation notice. Each licensee who cancels a shipment for which advance notification has been sent shall send a cancellation notice to the governor of each state or to the governor's designee previously notified and to the commission [NRC's Director, Division of Security Policy, Office of Nuclear Security and Incident Response, United States Nuclear Regulatory Commission, Washington, DC 20555-0001]. The licensee shall send the cancellation notice before the shipment would have commenced or as soon thereafter as possible. The licensee shall state in the notice that it is a cancellation and identify the advance notification that is being cancelled.

(5) Records. The licensee shall retain a copy of the advance notification and any revision and cancellation notices as a record for three years.

(6) Protection of information. State officials, State employees, and other individuals, whether or not licensees of the commission, NRC, or an Agreement State, who receive schedule information of the kind specified in paragraph (2) of this subsection shall protect that information against unauthorized disclosure as specified in subsection (j)(4) of this section.

(v) Requirements for physical protection of category 1 and category 2 quantities of radioactive material during shipment.

(1) Shipments by road.

(A) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 1 quantity of radioactive material shall:

(i) Ensure that movement control centers are established that maintain position information from a remote location. These control centers must monitor shipments 24 hours a day, seven days a week, and have the ability to communicate immediately, in an emergency, with the appropriate law enforcement agencies.

(ii) Ensure that redundant communications are established that allow the transport to contact the escort vehicle (when used) and movement control center at all times. Redundant communications may not be subject to the same interference factors as the primary communication.

(iii) Ensure that shipments are continuously and actively monitored by a telemetric position monitoring system or an alternative tracking system reporting to a movement control center. A movement control center must provide positive confirmation of the location, status, and control over the shipment. The movement control center must be prepared to promptly implement preplanned procedures in response to deviations from the authorized route or a notification of actual, attempted, or suspicious activities related to the theft, loss, or diversion of a shipment. These procedures will include, but not be limited to, the identification of and contact information for the appropriate LLEA along the shipment route.

ited to, the identification of and contact information for the appropriate LLEA along the shipment route.

(iv) Provide an individual to accompany the driver for those highway shipments with a driving time period greater than the maximum number of allowable hours of service in a 24-hour duty day as established by the Department of Transportation Federal Motor Carrier Safety Administration. The accompanying individual may be another driver.

(v) Develop written normal and contingency procedures to address:

(I) notifications [Notifications] to the communication center and law enforcement agencies;

(II) communication [Communication] protocols. Communication protocols must include a strategy for the use of authentication codes and duress codes and provisions for refueling or other stops, detours, and locations where communication is expected to be temporarily lost;

(III) loss [Loss] of communications; and

(IV) responses [Responses] to an actual or attempted theft or diversion of a shipment.

(vi) Each licensee who makes arrangements for the shipment of category 1 quantities of radioactive material shall ensure that drivers, accompanying personnel, and movement control center personnel have access to the normal and contingency procedures.

(B) Each licensee that transports category 2 quantities of radioactive material shall maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance.

(C) Each licensee who delivers to a carrier for transport, in a single shipment, a category 2 quantity of radioactive material shall:

(i) use [Use] carriers that have established package tracking systems. An established package tracking system is a documented, proven, and reliable system routinely used to transport objects of value. In order for a package tracking system to maintain constant control and/or surveillance, the package tracking system must allow the shipper or transporter to identify when and where the package was last and when it should arrive at the next point of control;

(ii) use [Use] carriers that maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance; and

(iii) use [Use] carriers that have established tracking systems that require an authorized signature prior to releasing the package for delivery or return.

(2) Shipments by rail.

(A) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 1 quantity of radioactive material shall:

(i) Ensure that rail shipments are monitored by a telemetric position monitoring system or an alternative tracking system reporting to the licensee, third-party, or railroad communications center. The communications center shall provide positive confirmation of the location of the shipment and its status. The communications center shall implement preplanned procedures in response to deviations from the authorized route or to a notification of actual, attempted, or suspicious activities related to the theft or diversion of a shipment. These procedures will include, but not be limited to, the identification of

and contact information for the appropriate LLEA along the shipment route.

(ii) Ensure that periodic reports to the communications center are made at preset intervals.

(B) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 2 quantity of radioactive material shall:

(i) use [Use] carriers that have established package tracking systems. An established package tracking system is a documented, proven, and reliable system routinely used to transport objects of value. In order for a package tracking system to maintain constant control and/or surveillance, the package tracking system must allow the shipper or transporter to identify when and where the package was last and when it should arrive at the next point of control;

(ii) use [Use] carriers that maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance; and

(iii) use [Use] carriers that have established tracking systems that require an authorized signature prior to releasing the package for delivery or return.

(3) Investigations. Each licensee who makes arrangements for the shipment of category 1 quantities of radioactive material shall immediately conduct an investigation upon the discovery that a category 1 shipment is lost or missing. Each licensee who makes arrangements for the shipment of category 2 quantities of radioactive material shall immediately conduct an investigation, in coordination with the receiving licensee, of any shipment that has not arrived by the designated no-later-than arrival time.

(w) Reporting of events.

(1) The shipping licensee shall notify the appropriate LLEA and [;] the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 [; and the NRC's Operations Center at (301) 816-5100] within one hour of its determination that a shipment of category 1 quantities of radioactive material is lost or missing. The appropriate LLEA would be the law enforcement agency in the area of the shipment's last confirmed location. During the investigation required by subsection (v)(3) of this section, the shipping licensee will provide agreed upon updates to the executive director [and the NRC's Operations Center] on the status of the investigation.

(2) The shipping licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 [and the NRC's Operations Center at (301) 816-5100] within four hours of its determination that a shipment of category 2 quantities of radioactive material is lost or missing. If, after 24 hours of its determination that the shipment is lost or missing, the radioactive material has not been located and secured, the licensee shall immediately notify the executive director [and the NRC's Operations Center].

(3) The shipping licensee shall notify the designated LLEA along the shipment route as soon as possible upon discovery of any actual or attempted theft or diversion of a shipment or suspicious activities related to the theft or diversion of a shipment of a category 1 quantity of radioactive material. As soon as possible after notifying the LLEA, the licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 [and the NRC's Operations Center at (301) 816-5100] upon discovery of any actual or attempted theft or diversion of a shipment or any suspicious activity related to the shipment of category 1 radioactive material.

(4) The shipping licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-

8224 [and the NRC's Operations Center at (301) 816-5100] as soon as possible upon discovery of any actual or attempted theft or diversion of a shipment or any suspicious activity related to the shipment, of a category 2 quantity of radioactive material.

(5) The shipping licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 [; the NRC's Operations Center at (301) 816-5100;] and the LLEA as soon as possible upon recovery of any lost or missing category 1 quantities of radioactive material.

(6) The shipping licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 [and the NRC's Operations Center at (301) 816-5100] as soon as possible upon recovery of any lost or missing category 2 quantities of radioactive material.

(7) The initial telephonic notification required by paragraphs (1) - (4) of this subsection must be followed within a period of 30 days by a written report submitted to the executive director [and NRC by an appropriate method listed in 10 CFR §37.7]. A written report is not required for notifications on suspicious activities required by paragraphs (3) and (4) of this subsection. [In addition, the licensee shall provide one copy of the written report addressed to the Director, Division of Security Policy, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.] The report must set forth the following information:

(A) a [A] description of the licensed material involved, including kind, quantity, and chemical and physical form;

(B) a [A] description of the circumstances under which the loss or theft occurred;

(C) a [A] statement of disposition, or probable disposition, of the licensed material involved;

(D) actions [Actions] that have been taken, or will be taken, to recover the material; and

(E) procedures [Procedures] or measures that have been, or will be, adopted to ensure against a recurrence of the loss or theft of licensed material.

(8) Subsequent to filing the written report, the licensee shall also report any additional substantive information on the loss or theft within 30 days after the licensee learns of such information.

(x) Form of records. Each record required by this section must be legible throughout the retention period specified in regulation by the licensing authority. The record may be the original or a reproduced copy or a microform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, and specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

(y) Record retention. Licensees shall maintain the records that are required in this section for the period specified by the appropriate regulation. If a retention period is not otherwise specified, these records must be retained until the executive director terminates the facility's license. All records related to this section may be destroyed upon executive director termination of the facility license.

(z) Category 1 and category 2 radioactive materials. The terabecquerel (TBq) values are the regulatory standard. The curie (Ci)

values specified are obtained by converting from the TBq value. The Ci values are provided for practical usefulness only.

Figure: 30 TAC §336.357(z) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2016.

TRD-201603980

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: September 18, 2016

For further information, please call: (512) 239-2613



SUBCHAPTER L. LICENSING OF SOURCE MATERIAL RECOVERY AND BY-PRODUCT MATERIAL DISPOSAL FACILITIES

30 TAC §336.1105, §336.1113

Statutory Authority

The amendments are proposed under the Texas Radiation Control Act (TRCA), Texas Health and Safety Code (THSC), Chapter 401; THSC, §401.011, which provides the commission the authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, and the recovery and processing of source material; THSC, §401.051, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; THSC, §401.103, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; THSC, §401.104, which requires the commission to provide rules for licensing for the disposal of radioactive substances; and THSC, §401.106, which authorizes the commission to adopt rules to exempt a source of radiation from the licensing requirements provided by the TRCA. The amendments are proposed as authorized by Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendments implement THSC, Chapter 401, and are proposed to meet compatibility standards set by the United States Nuclear Regulatory Commission.

§336.1105. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Aquifer**--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs. Any saturated zone created by uranium or thorium recovery operations would not be considered an aquifer unless the zone is or potentially is:

(A) hydraulically interconnected to a natural aquifer;

(B) capable of discharge to surface water; or

(C) reasonably accessible because of migration beyond the vertical projection of the boundary of the land transferred for long-term government ownership and care in accordance with §336.1131 of

this title (relating to Land Ownership of By-Product Material Disposal Sites).

(2) **As expeditiously as practicable considering technological feasibility**--As quickly as possible considering the physical characteristics of the by-product material and the site, the limits of "available technology" (as defined in this section), the need for consistency with mandatory requirements of other regulatory programs, and "factors beyond the control of the licensee" (as defined in this section). The phrase permits consideration of the cost of compliance only to the extent specifically provided for by use of the term "Available technology."

(3) **Available technology**--Technologies and methods for emplacing a final radon barrier on by-product material piles or impoundments. This term must not be construed to include extraordinary measures or techniques that would impose costs that are grossly excessive as measured by practice within the industry (or one that is reasonably analogous), (for example, by way of illustration only, unreasonable overtime, staffing, or transportation requirements, etc., considering normal practice in the industry; laser fusion of soils; etc.), provided there is reasonable progress toward emplacement of the final radon barrier. To determine grossly excessive costs, the relevant baseline against which costs must be compared is the cost estimate for tailings impoundment closure contained in the licensee's approved reclamation plan, but costs beyond these estimates shall not automatically be considered grossly excessive.

(4) **By-product material**--Tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. Underground ore bodies depleted by such solution extraction operations do not constitute "by-product material" within this definition.

(5) **By-product material disposal cell**--A man-made excavation and/or construction designed, sited, and built in accordance with the requirements of §336.1129 of this title (relating to Technical Requirements) for the purpose of disposal of by-product material.

(6) **By-product material pond**--A man-made excavation designed, constructed, and sited in accordance with the requirements of §336.1129 of this title (relating to Technical Requirements).

(7) **Capable fault**--As used in this section, "Capable fault" has the same meaning as defined in Section III(g) of Appendix A of Title 10 Code of Federal Regulations (CFR) Part 100.

(8) **Closure**--The post-operational activities to decontaminate and decommission the buildings and site used to produce by-product materials and/or reclaim the tailings or disposal area, including groundwater restoration, if needed.

(9) **Closure plan**--The plan approved by the agency to accomplish closure. The closure plan consists of a decommissioning plan and may also include a reclamation plan.

(10) **Commencement of construction**--Initiating activity defined as "construction" or any other activity at the site of a facility subject to regulations in this subchapter that has a reasonable nexus to radiological health and safety. [Any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site, but does not include changes desirable for the temporary use of the land for public recreational uses, necessary borings to determine site characteristics or other preconstruction monitoring to establish background information related to the suitability of a site, or to the protection of the environment.]

(11) Compliance period--The period of time that begins when the agency sets secondary groundwater protection standards and ends when the owner or operator's license is terminated and the site is transferred to the state or federal government for long-term care, if applicable.

(12) Construction--The installation of wells associated with radiological operations (e.g., production, injection, or monitoring well networks associated with in-situ recovery or other facilities), the installation of foundations, or in place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related to radiological safety or security. The term "construction" does not include:

(A) changes for the temporary use of the land for public recreational purposes;

(B) site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of a site, the environmental impacts of construction or operation, or the protection of environmental values;

(C) preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;

(D) erection of fences and other access control measures that are not related to the safe use of, or security of, radiological materials subject to this part;

(E) excavation;

(F) erection of support buildings (e.g., construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;

(G) building of service facilities (e.g., paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines);

(H) procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or

(I) initiating activity that has no reasonable nexus to radiological health and safety.

(13) [(+2)] Decommissioning plan--The plan approved by the agency to accomplish decommissioning. Decommission is defined in §336.2(29) of this title (relating to Definitions).

(14) [(+3)] Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(15) [(+4)] Disposal area--The area containing by-product materials to which the requirements of §336.1129(p) - (aa) of this title (relating to Technical Requirements) apply.

(16) [(+5)] Existing portion--As used in §336.1129(i)(1) of this title (relating to Technical Requirements), "existing portion" is that land surface area of an existing surface impoundment on which significant quantities of uranium or thorium by-product materials had been placed prior to September 30, 1983.

(17) [(+6)] Factors beyond the control of the licensee--Factors proximately causing delay in meeting the schedule in the applicable reclamation plan for the timely emplacement of the final radon

barrier notwithstanding the good faith efforts of the licensee to complete the barrier in compliance with §336.1129(x) of this title (relating to Technical Requirements). These factors may include, but are not limited to:

(A) physical conditions at the site;

(B) inclement weather or climatic conditions;

(C) an act of God;

(D) an act of war;

(E) a judicial or administrative order or decision, or change to the statutory, regulatory, or other legal requirements applicable to the licensee's facility that would preclude or delay the performance of activities required for compliance;

(F) labor disturbances;

(G) any modifications, cessation or delay ordered by state, federal, or local agencies;

(H) delays beyond the time reasonably required in obtaining necessary government permits, licenses, approvals, or consent for activities described in the reclamation plan proposed by the licensee that result from government agency failure to take final action after the licensee has made a good faith, timely effort to submit legally sufficient applications, responses to requests (including relevant data requested by the agencies), or other information, including approval of the reclamation plan; and

(I) an act or omission of any third party over whom the licensee has no control.

(18) [(+7)] Final radon barrier--The earthen cover (or approved alternative cover) over by-product material constructed to comply with §336.1129(p) - (aa) of this title (relating to Technical Requirements) (excluding erosion protection features).

(19) [(+8)] Groundwater--Water below the land surface in a zone of saturation. For purposes of this subchapter, groundwater is the water contained within an aquifer as defined in this section.

(20) [(+9)] Hazardous constituent--Subject to §336.1129(j)(5) of this title (relating to Technical Requirements), "hazardous constituent" is a constituent that meets all three of the following tests:

(A) the constituent is reasonably expected to be in or derived from the by-product material in the disposal area;

(B) the constituent has been detected in the groundwater in the uppermost aquifer; and

(C) the constituent is listed in 10 Code of Federal Regulations Part 40, Appendix A, Criterion 13.

(21) [(+20)] In situ leach--Refers to the actual oxidation and dissolution of uranium in an underground formation.

(22) [(+21)] In situ recovery--Refers to the process of stripping, precipitating, de-watering, and drying uranium in a surface processing plant.

(23) [(+22)] Leachate--Any liquid, including any suspended or dissolved components in the liquid, that has percolated through or drained from the by-product material.

(24) [(+23)] Licensed site--The area contained within the boundary of a location under the control of persons generating or storing by-product materials under a license.

(25) [(24)] Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment that restricts the downward or lateral escape of by-product material, hazardous constituents, or leachate.

(26) [(25)] Maximum credible earthquake--That earthquake that would cause the maximum vibratory ground motion based upon an evaluation of earthquake potential considering the regional and local geology and seismology and specific characteristics of local subsurface material.

(27) [(26)] Milestone--An action or event that is required to occur by an enforceable date.

(28) [(27)] Operation--

(A) the [The] period of time during which a by-product material disposal area is being used for the continued placement of by-product material or is in standby status for such placement. A disposal area is in operation from the day that by-product material is first placed in it until the day final closure begins; and

(B) the [The] period of time during which an in situ leach uranium recovery operation is actively leaching or recovering uranium.

(29) [(28)] Point of compliance--The site-specific location in the uppermost aquifer where the groundwater protection standard shall be met. The objective in selecting the point of compliance is to provide the earliest practicable warning that an impoundment is releasing hazardous constituents to the groundwater. The point of compliance is selected to provide prompt indication of groundwater contamination on the hydraulically downgradient edge of the disposal area.

(30) [(29)] Principal activities--Activities authorized by the license that are essential to achieving the purpose(s) for which the license is issued or amended. Storage during which no licensed material is accessed for use or disposal and activities incidental to decontamination or decommissioning are not principal activities.

(31) [(30)] Reclamation--Those activities at a uranium recovery licensed facility that work towards achieving the criteria under this subchapter for release of equipment, facilities and/or the site (including land) to unrestricted use or termination of the license.

(32) [(31)] Reclamation plan--

(A) for [Før] the purposes of paragraph (22) [(21)] of this section and §336.1115 of this title (relating to In situ recovery and Expiration and Termination of Licenses; Decommissioning of Sites; Separate Buildings or Outdoor Areas, respectively), "reclamation plan" is the plan detailing activities to accomplish reclamation of the licensed site (land surface) where in situ recovery and related activities are licensed to occur. The reclamation plan shall include a schedule for reclamation milestones that are key to the clean-up of the in situ recovery plant location, well fields, and any by-product waste storage location; or

(B) for [Før] the purposes of §336.1129(p) - (aa) of this title (relating to Technical Requirements), "reclamation plan" is the plan detailing activities to accomplish reclamation of the by-product material disposal area in accordance with the technical criteria of this section. The reclamation plan shall include a schedule for reclamation milestones that are key to the completion of the final radon barrier, including as appropriate, but not limited to, windblown tailings retrieval and placement on the pile, interim stabilization (including dewatering or the removal of freestanding liquids and recontouring), and final radon barrier construction. Reclamation of by-product material shall also be addressed in the closure plan. The detailed reclamation plan may be incorporated into the closure plan.

(33) [(32)] Restoration--Those activities that seek to return the groundwater at an underground injection control permitted site to restoration levels established by permit.

(34) [(33)] Security--This term has the same meaning as financial assurance.

(35) [(34)] Surface impoundment--A natural topographic depression, man-made excavation, or diked area at a conventional uranium mill, which is designed to receive waste from the milling process which may contain liquid wastes or wastes containing free liquids, solid wastes, mill site demolition materials and debris, and other by-product materials from the milling site.

(36) [(35)] Unrefined and unprocessed ore--Ore in its natural form before any processing, such as grinding, roasting, beneficiating, or refining. Processing does not include sieving or encapsulation of ore or preparation of samples for laboratory analysis.

(37) [(36)] Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

(38) [(37)] Uranium recovery--Any uranium extraction or concentration activity that results in the production of "by-product material" as it is defined in this chapter and as it pertains to uranium ore only. As used in this definition, "Uranium recovery" has the same meaning as "uranium milling" in 10 Code of Federal Regulations §40.4.

§336.1113. *Specific Terms and Conditions of Licenses.*

Unless otherwise specified, each license issued in accordance with this section is subject to the requirements of §305.125 of this title (relating to Standard Permit Conditions) and the following.

(1) Daily inspection of any by-product material retention systems shall be conducted by the licensee. General qualifications for individuals conducting inspections shall be approved by the agency. Records of the inspections shall be maintained for review by the agency.

(2) In addition to the applicable requirements of §336.350 and §336.352 of this title (relating to Reports of Stolen, Lost, or Missing Licensed Radioactive Material and Reports of Exposures, Radiation Levels, and Concentrations of Radioactive Material Exceeding the Limits), the licensee shall immediately notify the agency of the following:

(A) any failure in a by-product material retention system that results in a release of by-product material into unrestricted areas or of any unusual conditions (conditions not contemplated in the design of the retention system) that if not corrected could indicate the potential or lead to failure of the system and result in a release of by-product material into unrestricted areas;

(B) any release of radioactive material that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title (relating to Appendix B. Annual Limits in Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage) and that extends beyond the licensed boundary;

(C) any spill that exceeds 20,000 gallons and that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title; or

(D) any release of solids that exceeds the limits in §336.1115(e) of this title (relating to Expiration and Termination of Licenses; Decommissioning of Sites, Separate Buildings or Outdoor Areas) and that extends beyond the licensed boundary.

(3) In addition to the applicable requirements of Chapter 327 of this title (relating to Spill Prevention and Control) and §336.350 and §336.352 of this title, the licensee shall notify the agency within 24 hours of the following:

(A) any spill that extends:

(i) beyond the wellfield monitor well ring;

(ii) more than 400 feet from an injection or production well pipe artery to or from a recovery plant; or

(iii) more than 200 feet from a recovery plant; or

(B) any spill that exceeds 2,000 gallons and that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title.

(4) A written report to the executive director within 30 days after learning of the occurrence of a spill as described in subparagraph (A) or (B) of this paragraph. The report shall include the following:

(A) location of the spill;

(B) cause of the spill;

(C) corrective steps taken or planned to ensure against a recurrence; and

(D) timely schedule for remediation of the spill or release, if required.

(5) At any time before termination of the license, the licensee shall submit written statements under oath upon request of the commission or executive director to enable the commission to determine whether or not the license should be modified, suspended, or revoked.

(6) The licensee shall be subject to the applicable provisions of Texas Health and Safety Code, Chapter 401, also known as the Texas Radiation Control Act (TRCA) now or hereafter in effect and to applicable rules and orders of the commission. The terms and conditions of the license are subject to amendment, revision, or modification, by reason of amendments to TRCA or by reason of rules and orders issued in accordance with terms of TRCA.

(7) Any license may be revoked, suspended, or modified, in whole or in part, for any material false statement in the application or any statement of fact required under provisions of TRCA, or because of conditions revealed by any application or statement of fact or any report, record or inspection or other means that would warrant the commission to refuse to grant a license on the original application, or for failure to operate the facility in accordance with the terms of the license, or for any violation of or failure to observe any of the terms and conditions of TRCA or the license or of any rule or order of the commission.

(8) Each person licensed by the commission under this subchapter shall confine possession and use of radioactive materials to the locations and purposes authorized in the license.

(9) No by-product may be disposed of until the executive director has inspected the facility and has found it to be conformance with the description, design, and construction described in the application for a by-product disposal license. No by-product may be received for disposal at the facility until the executive director has approved financial assurance.

(10) The commission may incorporate in any license at the time of issuance, or thereafter, by appropriate rule or order, additional requirements or conditions with respect to the licensee's receipt, pos-

session, or disposal of by-product as it deems appropriate or necessary in order to:

(A) protect the health and safety of the public and the environment; or

(B) require reports and recordkeeping and to provide for inspections of activities under the licenses that may be necessary or appropriate to effectuate the purposes of TRCA and rules thereunder.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2016.

TRD-201603981

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: September 18, 2016

For further information, please call: (512) 239-2613



TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS

SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH (TRS-ACTIVECARE)

34 TAC §41.36

The Teacher Retirement System of Texas (TRS) proposes amendments to §41.36, which is located in Title 34, Part 3, Chapter 41, Subchapter C, of the Texas Administrative Code. Chapter 41 addresses the two health benefit programs (TRS-Care and TRS-ActiveCare) administered by TRS, as trustee, and the responsibilities of school districts that do not participate in the active employee health benefit plan (TRS-ActiveCare) to determine the comparability of the health coverage offered to their respective employees. Subchapter C concerns TRS-ActiveCare.

The proposed amendments to §41.36(a) simplify the wording of the initial enrollment opportunity afforded therein to a full-time or part-time employee and clarify that this enrollment opportunity also applies to the eligible dependents of the employee. However, due to the existing definitions of a full-time and part-time employee found in §41.33, these changes do not make any substantive changes to this enrollment opportunity.

The proposed, new §41.36(b) creates an additional enrollment opportunity for a part-time employee eligible for TRS-ActiveCare who later becomes a full-time employee eligible for TRS-ActiveCare during the current plan year. This enrollment opportunity also applies to the employee's eligible dependents. This enrollment opportunity exists even if this employee previously declined enrollment in TRS-ActiveCare during the current plan year. An eligible part-time employee who later becomes a full-

time employee eligible for TRS-ActiveCare during the current plan year may also become eligible for employer mandated coverage under the Patient Protection and Affordable Care Act (aka the "PPACA"). This additional enrollment opportunity will allow participating entities to offer TRS-ActiveCare coverage to such individuals, which will allow the participating entities to avoid a penalty that they may otherwise incur under the PPACA.

The proposed amendments to current §41.36(b) clarify that the initial enrollment period for an eligible full-time or part-time employee whose employer becomes a participating entity is equally applicable to the employee's eligible dependents.

Current §41.36(d) addresses special enrollment events associated with TRS-ActiveCare that arise under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) on or after September 1, 2011. Current §41.36(e) addresses special enrollment events associated with TRS-ActiveCare that arose on or before August 31, 2011, as defined by TRS-ActiveCare itself. With the passage of time, for the sake of clarity, the introductory language in current §41.36(d) and the entire current §41.36(e) are no longer necessary and can be deleted.

Ken Welch, TRS Deputy Director, estimates that, for each year of the first five years that the proposed amendments to §41.36 will be in effect, there will be no foreseeable fiscal implications to state or local governments as a result of administering the proposed amended rule.

For each year of the first five years that the proposed amendments to §41.36 will be in effect, Mr. Welch and Mr. Brian Guthrie, TRS Executive Director, have determined that the public benefit will be to provide a new enrollment opportunity for an eligible part-time employee who later becomes an eligible full-time employee during the current plan year, to clarify and update provisions concerning the administration of TRS-ActiveCare, and to remove a subsection of the rule that is no longer necessary due to the passage of time.

Mr. Guthrie and Mr. Welch have determined that there is no economic cost to entities or persons required to comply with the proposed rule. Mr. Guthrie and Mr. Welch have determined that there will be no effect on a local economy because of the proposals, and therefore no local employment impact statement is required under §2001.022 of the Government Code. Mr. Guthrie and Mr. Welch have also determined that there will be no direct adverse economic effect on small businesses or micro-businesses within TRS's regulatory authority as a result of the proposed amended rules; therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Brian Guthrie, Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register*.

Statutory Authority: The amendments to §41.36 are proposed under the authority of §1579.052 of the Insurance Code, which authorizes TRS as trustee of the TRS-ActiveCare program to adopt rules it considers necessary to implement and administer the program.

Cross-Reference to Statute: The proposed amendments affect Chapter 1579 of the Insurance Code, which provides for the establishment and administration of TRS-ActiveCare.

§41.36. *Enrollment Periods for TRS-ActiveCare.*

(a) An individual who becomes an eligible [A] full-time or eligible part-time employee [who becomes employed in an eligible capacity with a participating entity] has an initial enrollment period, for both himself or herself as well as for his or her eligible dependents, [of 31 days,] beginning on the first day that the individual becomes an eligible [full-time or part-time] employee [becomes employed in an eligible capacity with a participating entity] and ending at 11:59:59 [11:59] p.m. Austin Time on the 31st day thereafter.

(b) If a current employee of a participating entity was an eligible part-time employee during an enrollment opportunity for the current plan year, and, later during the current plan year, this employee becomes an eligible full-time employee, then this employee has an enrollment period, for both himself or herself as well as for his or her eligible dependents, beginning on the first day that this individual becomes an eligible full-time employee and ending at 11:59:59 p.m. Austin Time on the 31st day thereafter. This enrollment opportunity exists even if this employee previously declined enrollment in TRS-ActiveCare during the current plan year.

(c) [(b)] An eligible [A] full-time or part-time employee whose employer becomes a participating entity has an initial enrollment period, for both himself or herself as well as for his or her eligible dependents, beginning no later than 31 days prior to the date on which the employer becomes a participating entity and ending on the last calendar day of the month immediately preceding the date on which the employer becomes a participating entity ("end date"). Notwithstanding the preceding sentence, a large school district, as defined hereafter, that becomes a participating entity after September 1, 2003, may recommend an initial enrollment period of not less than 31 days that closes before the end date. A recommended initial enrollment period that closes before the end date is subject to approval by TRS. As used in this section, a large school district shall mean a school district that had 1001 or more employees at any time during the 2001 school year, as reflected on any report received by TRS from that school district for a reporting period in that school year.

(d) [(e)] A full-time or part-time employee's eligible dependents, if covered, must be enrolled in the same coverage plan as the full-time or part-time employee under whom they qualify as a dependent. Except as otherwise provided under applicable state or federal law, an eligible full-time or part-time employee may not change coverage plans or add dependents during a plan year.

(e) [(d)] The [On or after September 1, 2011, the] enrollment period for an individual who becomes eligible for coverage due to a special enrollment event, as described in §41.34(8) of this chapter (relating to Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program), shall be the 31 calendar days immediately after the date of the special enrollment event. To make an effective election, a completed enrollment form must be received by a participating entity or the health plan administrator of TRS-ActiveCare within this 31-day period.

[(e)] On or before August 31, 2011, the enrollment period for an individual who becomes eligible for coverage due to a special enrollment provision of TRS-ActiveCare, as described in §41.34(9) of this chapter, shall be the 31 calendar days immediately after the date of the special enrollment event. To make an effective election, a completed enrollment form must be received by a participating entity or the health plan administrator of TRS-ActiveCare within this 31-day period.]

(f) Eligible full-time and part-time employees and their eligible dependents who are enrolled in an HMO with a TRS contract that is not renewed for the next plan year may make one of the elections provided under this subsection. To make an effective election, a completed enrollment form must be received by a participating entity or

the health plan administrator of TRS-ActiveCare during the plan enrollment period. Coverage under the elected option becomes effective on September 1 of the next plan year. One of the following elections may be made under this subsection:

(1) change to another approved HMO for which the full-time or part-time employee is eligible; or

(2) enroll in the TRS-ActiveCare preferred provider organization coverage plan, without preexisting condition exclusions.

(g) Eligible full-time or part-time employees and their eligible dependents who are enrolled in an HMO with a TRS contract that is terminated during the plan year may make one of the elections provided under this subsection. To make an effective election, a completed enrollment form must be received by a participating entity or the health plan administrator of TRS-ActiveCare within 31 calendar days after notice of the contract termination is sent to the eligible full-time or part-time employee by TRS or its designee. Coverage under the elected option becomes effective on a date determined by TRS. One of the following elections may be made under this subsection:

(1) change to another approved HMO for which the full-time or part-time employees and their eligible dependents are eligible; or

(2) enroll in the TRS-ActiveCare preferred provider organization coverage plan, without preexisting condition exclusions.

(h) Eligible full-time or part-time employees and their eligible dependents enrolled in an approved HMO whose eligibility status changes because the eligible full-time or part-time employee no longer resides, lives, or works in the HMO service area may make one of the elections provided under this subsection. To make an effective election,

a completed enrollment form must be received by a participating entity or the health plan administrator of TRS-ActiveCare within 31 calendar days after the employee's change in eligibility status. Coverage under the elected option becomes effective on the first day of the month following the date the employee's eligibility status changed. One of the following elections may be made under this subsection:

(1) enroll in another approved HMO for which the full-time or part-time employee is eligible; or

(2) enroll in the TRS-ActiveCare preferred provider organization coverage plan, subject to applicable preexisting condition limitations.

(i) On behalf of the trustee, the executive director or a designee may prescribe open-enrollment periods and the conditions under which an eligible full-time or part-time employee and his eligible dependents may enroll during an open-enrollment period.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 1, 2016.

TRD-201603873

Brian K. Guthrie

Executive Director

Teacher Retirement System of Texas

Earliest possible date of adoption: September 18, 2016

For further information, please call: (512) 542-6513

